S. HRG. 99-957

MUNICIPAL LIABILITY

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

S. 436

A BILL TO AMEND SECTION 1979 OF THE REVISED STATUTES (42 U.S.C. 1983), RELATING TO CIVIL ACTIONS FOR THE DEPRIVATION OF RIGHTS, TO LIMIT THE APPLICABILITY OF THAT STATUTE TO LAWS RELATING TO EQUAL RIGHTS, AND TO PROVIDE A SPECIAL DEFENSE TO THE LIABILITY OF POLITICAL SUBDIVISIONS OF STATES

SALT LAKE CITY, UTAH
FEBRUARY 12, 1986

Serial No. J-99-87

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

64-230 O WASHINGTON : 1986

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S521-17

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MUNICIPAL LIABILITY

WEDNESDAY, FEBRUARY 12, 1986

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Salt Lake City, UT.

The subcommittee met, pursuant to notice, at 9:30 a.m. in the City and County Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Staff present: Randall R. Rader, chief counsel and staff director.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. It is a pleasure to welcome you to this hearing of the Senate Subcommittee on the Constitution. The subcommittee will today begin an investigation of the threats to towns, cities, counties, and States posed by extensive liability under 42 U.S.C. 1983.

To put this hearing in context, it would help to review briefly, the history of this law. On March 23, 1871, President Grant called upon Congress to enact legislation to counter many of the abuses of the Klu Klux Klan in the Antebellum South. Although swiftly enacted, the 1871 act, now cited as 42 U.S.C. 1983, was rarely used for nearly a century. In 1961, the Supreme Court broadly construed the statute to permit Federal court actions even where adequate State remedies exist. In the case of *Monroe* v. *Pape,* 365 U.S.C. 167, this case revived the statute as a protection for individuals whose constitutional or civil rights may be violated under color of State law. This beneficial aspect of the revival of the 1871 act was clouded, however, by a host of unanticipated side effects.

The first side effect of a broad reading of section 1983 was a dramatic increase in the Federal court caseload. Between 1976 and 1984, the number of section 1983 suits increased approximately 110 percent. This single section of the United States Code accounts for 28,000 cases annually or 10 percent of the entire Federal caseload. Chief Justice Burger and Justice Powell explain the significance of this unprecedented increase in section 1983 cases.

This litigation is a heavy burden on the Federal courts to the detriment of all Federal court litigants, including others who assert that their constitutional rights have been infringed.

This burden is exacerbated by large categories of section 1983 litigation bearing very little relation to traditional concepts of civil rights. The lofty concept of civil rights is diluted by suits contend-

ing that a student's grade point average was wrongfully reduced from 95.478 to 95.413 out of a 100, or that a pet owner's dog was wrongfully detained by the local dogcatcher. Moreover, the Department of Justice estimates that over 18,000 section 1983 suits, 64 percent of the total, are filed by prisoners. One imprisoned felon in Missouri filed over 500 cases in a 5-year period, an average of 2 per week. This type of litigation hardly advances the civil rights intended to be protected in 1871.

Perhaps the most disturbing side effect of the broad reading given to section 1983 however, has been the threat to State and local governments. In 1980, the Supreme Court ruled that a municipality is absolutely liable for violations regardless of the good faith of its officers. *Owen* v. *City of Independence,* 445 U.S. 622.

In addition to serious arguments that this ruling is inconsistent with the legislative history of the 1871 act and Supreme Court precedent, the rationale that municipal liability will deter constitutional violations does not apply where the municipality is acting with good faith that its conduct is legal.

Nonetheless, one Utah town with 60 registered voters was recently held liable for $2.7 million in damages in a dispute over construction permits. In the neighboring State of Arizona, the town of South Tucson was forced into bankruptcy after losing a multimillion-dollar action involving a policeman's use of force. An alternative to crippling or fatal liability is insurance, but in the face of this litigation landslide, municipal liability insurance rates have recently increased 200 to 700 percent. According to news accounts, some Utah towns will have to forego street improvements or impose hiring freezes to meet the hikes in liability insurance caused by lawsuits that are difficult to characterize as vindicating vital civil rights.

In an effort to focus the protections of section 1983 on deprivations of constitutional rights dealing with equality and human dignity and to correct some abuses of the 1871 act, I have introduced S. 436. Now this legislation attempts to accomplish this objective in several ways:

It would limit this vital civil rights action to violations of laws guaranteeing equal rights and thus relieve municipalities from potential liabilities for violations of the Federal Noxious Weed Act of 1974 or the Wild Horse and Burro Act or hundreds of other obscure Federal Laws.

It would restore a good faith defense for municipalities.

It would require exhaustion of adequate State administrative and judicial remedies as a precondition for bringing a Federal court action.

It would establish a uniform statute of limitations for section 1983 actions.

The suggestions embodied in S. 436 may not be the only worthy recommendations to restore section 1983 to its intended purposes. For instance, the subcommittee may wish to consider limiting punitive damages to truly egregious cases or eliminating the act as a basis for prisoners' claims. In any event, the testimony of today's expert witnesses will be important to the Senate Judiciary Committee's review of this issue. We look forward to their advice.

During the last several years I have traveled around the State and met with my advisory groups, which are basically made up of local government leaders all over the State. I found that this was the No. 1 issue in most towns and municipalities. They are concerned and have been frightened by the fact that some of them cannot afford liability insurance and that liability insurance rates have really escalated to such an unprecedented rate. It's not just here. There are many other areas of law in malpractice which are a perfect illustration as well.

Doctors are not practicing their profession because they just plain do not want to pay $60,000 to $90,000 a year in malpractice insurance. There are many inequities and difficulties that we hope we can resolve. I am not a great believer that the government can resolve all difficulties, but I am a great believer that something has to be done with regard to these section 1983 cases. We are hopeful that the testimony that will be presented here today will help us to understand what needs to be done in these cases.

[Text of S. 436 follows:]

II

99TH CONGRESS
1ST SESSION

S. 436

To amend section 1979 of the Revised Statutes (42 U.S.C. 1983), relating to civil actions for the deprivation of rights, to limit the applicability of that statute to laws relating to equal rights, and to provide a special defense to the liability of political subdivisions of States.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 7 (legislative day, JANUARY 21), 1985

Mr. HATCH (for himself and Mr. THURMOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend section 1979 of the Revised Statutes (42 U.S.C. 1983), relating to civil actions for the deprivation of rights, to limit the applicability of that statute to laws relating to equal rights, and to provide a special defense to the liability of political subdivisions of States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by striking out "and laws" and inserting in lieu thereof the following: "and by any law providing for equal rights of citizens or of all persons within the jurisdiction of the United States".

SEC. 2. Section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by inserting "(a)" before "Every" and by adding at the end thereof the following new subsections:

"(b) In any action brought under this section, damages shall not be awarded against any government entity if the court finds that the officials thereof were acting in good faith.

"(c) An action brought pursuant to this section shall be forever barred unless the complaint is filed within 18 months after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within 9 months after the disability ceases.

"(d) In an action brought pursuant to this section, the Federal Court shall not have jurisdiction unless the person filing such action has exhausted all administrative and judicial remedies available. Such person shall not be deemed to have exhausted all remedies available, within the meaning of this section, if he has the right under any regulation or law of the State to raise, by any available procedure the question presented.".

Senator HATCH. Our first witness will be Utah's attorney general, David Wilkinson.

I might say at the outset of this hearing that the subcommittee will make all written statements a part of the record. Therefore, you do not have to read your statements. In fact, we prefer that you summarize them. This will enable each of the witnesses to condense his or her remarks to approximately 10 minutes. This will also permit the subcommittee to pose questions to each of the witnesses.

Attorney General Wilkinson, we are happy to have you here today.

STATEMENT OF HON. DAVID WILKINSON, ATTORNEY GENERAL FOR THE STATE OF UTAH, ACCOMPANIED BY CARLIE CHRISTENSEN, STAFF LAWYER

General WILKINSON. Senator Hatch, I'm honored to have been invited once more to appear before you as chairman of this subcommittee of the Judiciary Committee. I'd like to introduce to you Carlie Christensen, a lawyer on my staff who assisted me with my written preparation, which I will not read, or at least will not read all of.

You have noted that I have been before you several times before in Washington. One of those times was a hearing just on section 1988. The earlier time was a hearing on section 1983, but you may remember that even at that hearing I commented on the fact that section 1988 was the mechanism which fueled section 1983 litigation. And that certainly many, perhaps all of the abusive, outrageous section 1983 claims could be avoided if we can do something about section 1988.

Now, this is a hearing on section 1983, may I just give you one more horror story about section 1988 before getting into the subject.

Senator HATCH. Yes.

General WILKINSON. I understand that Senator DeConcini made an attempt to be here, but obviously there were reasons he could not be here. But in his home State of Arizona, within the last 6 or 12 months, I have recently learned there was a lawsuit where the plaintiff was the ACLU, and it was a lawsuit that was brought by the prison project of the ACLU. Now, the prison project of the ACLU is a nationwide undertaking, and they won at least part of their section 1983 case in Arizona. It had to do with overcrowding in the prison there, and received an award of $475,000.

Now, the State of Arizona, through their solicitor general in the Arizona attorney general's office, who is very close to Senator DeConcini incidentally, advises me that they are positive, although they can't prove it, that a good part of the research that went into that award of $475,000 was research that had been conducted by that prison project for all of its cases, nationwide. And the possibility for duplication of awards is just too apparent to overlook.

So the next time you talk to your colleague about section 1988, you might ask him to speak with the Arizona attorney general or their solicitor general about that recent award of almost a half million dollars.

Your opening statement Senator, has stolen the thunder from the first two or three pages of my prepared statement. I suspect one of the reasons for that, is that my speech writer and your speech writer both had a common source, an article that appeared in the Cumberland Law Review, which——

Senator HATCH. I am sure you have plenty of thunder.

General WILKINSON. That's a very fine article incidentally. But let me get to the specifics of S. 436. The amendments to section 1983 contained in S. 436, will not, in our view, compromise the original intent of section 1983, but will further its purpose while eliminating many of the unintended and adverse side effects which have resulted from the court's expansive interpretation of the act. The amendments you propose will provide a degree of certainty and uniformity to section 1983 cases which will free the court system from the burden of resolving each case upon its unique set of facts and will deter fruitless litigation over issues which can be settled by congressional determination.

Finally and perhaps most importantly, the amendments will ease the liability stronghold placed on State and local government officials by limiting Federal judicial oversight of programs administered at the State and local government level and by eliminating the undesirable consequence of the *Owens* decision to which you referred, which requires local officials to anticipate the ad hoc creation of constitutional and civil rights by the Federal judiciary.

In Utah, section 1983 has been used as a basis for litigating claims primarily in the areas of public entitlement programs, prison conditions, and constitutional challenges to State law. More recently section 1983 in Utah has been advanced as a basis for challenging the management and operation of various social service programs administered by State and local governments. The enhancement of the proposed amendments in your bill, would substantially impact the amount of litigation in these areas, and indeed would diminish that litigation.

For example with respect to public assistance programs, the wrongful or erroneous denial of benefits had been equated with a violation of Federal laws, specifically the Social Security Act, and consequently a violation of section 1983.

Once such a violation is established, the Federal court can order various forms of relief, including restoration of benefits, modification of State policy and procedures, notification to all members of the plaintiff class who were wrongfully denied benefits and the payment of attorney's fees.

The Federal court, however, is precluded by the 11th amendment from awarding benefits to plaintiffs on a retroactive basis. The amendments to section 1983 you propose, would affect this scenario in two respects:

First, by modifying the laws language, contained in section 1983 to read: "and by any law providing for equal rights." The Social Security Act could no longer be used as the means of establishing a violation of section 1983. And thus any injury sustained as a result of violating the act could be redressed by the Federal courts without the requisite finding of a civil rights violation and more importantly, without the necessity of awarding attorney's fees.

Second, an amendment to section 1983 requiring the aggrieved assistance recipient to exhaust his or her State remedies would have the salutory effect of allowing the State the first opportunity to correct any error which it might have made in the administration of the program, or the determination of eligibility, and at the same time afford the assistance recipient, perhaps the most significant form of relief, the retroactive payment of benefits.

The Supreme Court, Senator Hatch, has repeatedly invited Congress to address some of the failings of section 1983. I believe the proposed amendments in your bill are responsive to some of those concerns. Our office strongly endorses S. 436 and we applaud your efforts and the efforts of the subcommittee to provide meaningful legislative reform in a very complex and troublesome area of the law. And I might add that last sentence applies to your efforts to do something about section 1988 as well.

Senator HATCH. Thank you. In his dissent in the *Thiboutot* case, Justice Powell predicted that section 1983 claims would be appended solely for the purpose of getting attorney's fees, under 42 U.S.C. 1988. You mentioned that. I am aware that the National Association of Attorneys General has completed a study which includes examples of where attorney's padded their meritorious State law complaints with weak or meritless civil rights claims in order to obtain additional fees.

Have you seen evidence of this as well?

General WILKINSON. Before we respond to that, may I just say about the National Association of Attorneys General report. We are a very diverse group. Actually 55 attorneys general from the States and territories. And politically we are very diverse. There is no one issue which brings us together more than the issue of section 1988, and that is evident from the report which you have and Mr. Rader has examined carefully, and I'm sure you have too, drafted really by a conservative attorney general from the State of Washington and his staff and also a very liberal attorney general, General Bellotti from the State of Massachusetts and his staff.

To answer your question specifically, I'd have to ask Ms. Christensen if in her experience that is happening in Utah. I know this happened in many other States.

Senator HATCH. You might also want to give us your opinion about the changes in the Thiboutot doctrine, envisioned by S. 436.

Ms. CHRISTENSEN. I'll be very candid, Senator. I think the experience in Utah in some respects pales by comparison to what goes on in many other jurisdictions. We have certainly seen isolated instances of the plaintiffs bar padding some of their complaints with pendant State claims in order to receive the benefit of section 1988.

However, I don't see the abuses perhaps in our State, that may exist across the country. I certainly think that the proposed amendments will cure some of the problems which were the result of the interpretation the Supreme Court gave section 1983 in the *Thiboutot* case.

Senator HATCH. Thank you. As we mentioned earlier, the Supreme Court on the *Owen* case denied municipalities any good faith defense. Doesn't *Owen* in effect, require municipal officers to predict the outcome of court decisions?

General WILKINSON. Precisely, I made note of that in my testimony. It requires them to read correctly the tea leaves of where the court is going, and of course, given the fact of life of activist judges on the Federal judiciary, that is just an intolerable situation.

Senator HATCH. Do you think the limitation proposed by S. 436 is an adequate and/or fair statute of limitations standard?

General WILKINSON. Is it just one period of limitations or is it a grey dated——

Senator HATCH. One 18 month period.

General WILKINSON. One 18 month period.

Senator HATCH. As I recall.

General WILKINSON. Senator, I haven't focused on that question. I certainly think it's in the ball park. You know, whether it's 18 months or 2 years, I wouldn't have any—I wouldn't quibble between the two different periods. Certainly it shouldn't be a 4- or 5-year period.

Senator HATCH. Or a 15-year period. As I mentioned in my opening statement, 10 percent of all cases filed in the Federal courts are filed under section 1983. Sixty percent of those are filed by prisoners. Has your experience with litigation here in Utah indicated similar use of section 1983? And do you have any suggestions if it has, or if it hasn't, with the flood of cases filed by prisoners?

General WILKINSON. Well, I think if I may, I'd like to defer to again, Ms. Christensen on this. She doesn't herself handle all of the prison section 1983 actions, but I think she's aware of certainly most of them.

Ms. CHRISTENSEN. I frankly get more than my fair share of some of those inmate lawsuits. I think there is absolutely no question that section 1983 forms the basis for virtually all of the prison litigation filed in the State of Utah. There are two recent U.S. Supreme Court decisions which, I think, will have substantial impact on the amount of litigation in this area. The Supreme Court has finally cut off negligence as a basis for filing a section 1983 lawsuit, and has recognized that some of the conduct engaged in by State officials which formed the basis of a section 1983 action is really very trivial and does not give rise to constitutional violations.

So I think there are two decisions, and I'm sorry I cannot cite the Senator to the names of those decisions, but they have come down in the last month and I think they'll certainly deter the amount of litigation in that area currently.

Senator HATCH. One last question. In both of your opinions should S. 436 be construed as a retreat for civil rights enforcement?

General WILKINSON. I think that whoever makes that claim just doesn't understand the facts of life. It's clearly a reaffirmation of the principles behind the original legislation. What has happened is that the courts have gone wild with section 1983, activist judges. Obviously they are not all activists, but I know from personal conversations, off the record conversations, with at least one Federal judge, that he just feels bound to grant standing and to allow certain section 1983 claims based upon the decisions of the U.S. Supreme Court. And what we are simply doing here is we are cutting out the abuses, the judicial gloss that has been placed, over the last 10, 15 years, by a moderate to quite an activist court, Federal judiciary.

Senator HATCH. I want to thank both you and Ms. Christensen for your testimony. This is one of the most serious problems in the country today. It is difficult for me to understand why Members of Congress are not more willing to resolve it. The bill does not do away with section 1983 cases, it just provides some of the necessary protections for the municipalities and governmental entities that they presently do not have now in these matters. It still permits the right for true civil rights violations suits to be brought.

[The prepared statement of General Wilkinson follows:]

Prepared Statement of David L. Wilkinson

Distinguished Senators:

I am honored to be invited to testify before this subcommittee on the subject of civil rights litigation and the proposed amendments to 42 U.S.C. § 1983.

As you are well aware, Congress passed the Civil Rights Act of 1871, the precursor to § 1983, to protect persons from the deprivation of any rights, privileges or immunities secured by the Constitution of the United States. At the time of its enactment, its purpose was to provide a remedy for crimes committed by Ku Klux Klan members against persons who attempted to exercise their newly acquired right to vote. That remedy was to be available where state statutes denied civil rights or where state law purported to protect civil rights but was ignored by those charged with the duty of enforcing it.

For many years, in fact for the first 90 years after the Civil Rights Act was passed, it lay dormant. However, in 1961, the United States Supreme Court gave life to the Act by its decision in Monroe v. Pape, 365 U.S. 167 (1961), which held that § 1983 provided a federal remedy in federal court to parties deprived of constitutional rights where the state remedy, though adequate in theory, was not available in practice.

Consequently, in 1961, 270 civil rights cases were filed in federal court. Since 1961, litigation of civil rights claims has expanded at an alarming rate. Between 1970 and 1980, civil rights cases filed by state prisoners alone rose by more than 500%. In 1982, civil rights cases filed against public officials constituted 20% of the United States Supreme Court's caseload.

But this virtual explosion of civil rights claims and the evils and abuses associated with this type of litigation did not result from the mere enactment of the statute or the judicial creation of a federal remedy, but in the expansive interpretation which the Supreme Court has given to § 1983 since the Monroe decision.

During the past 25 years, the Supreme Court has applied § 1983 to the protection of property rights as well as personal rights; has allowed suits against governmental entities as well as individual officers and employees; has expanded the forum for litigating § 1983 claims to state courts as well as federal courts; has applied § 1983 to claims based upon purely statutory violations of federal law in addition to constitutional violations and has abolished absolute and good faith immunity as affirmative defenses for local governmental entities.

In short, the Court has created a vast body of federal law which allows individuals to maintain a civil rights action against governmental entities and their officers and employees without regard for the state or local government's level of culpability, their methods for corrective action or the chilling effect which the potential for litigation has on government operations and agency discretion in general.

The amendments to § 1983 contained in Senate Bill 436 will not compromise the original intent of § 1983 but will further its purpose while eliminating many of the unintended and adverse side-effects which have resulted from the Court's expansive interpretation of the Act. These amendments will provide a degree of certainty and uniformity to § 1983 cases which will free the court system from the burden of resolving each case upon its unique set of facts and will deter fruitless litigation over issues which can be settled by congressional determination. Finally and perhaps most importantly, the amendments will ease the "liability" stronghold placed on state and local government officials by limiting federal judicial oversight of programs administered at the state and local government level and by eliminating the undesirable consequence of the Owens decision which requires local officials to anticipate the ad-hoc creation of constitutional and civil rights by the federal judiciary.

In Utah, § 1983 has been used as a basis for litigating claims primarily in the areas of public entitlement programs,

prison conditions and constitutional challenges to state law. More recently § 1983 has been advanced as the basis for challenging the management and operation of various social service programs administered by state and local government. The enactment of the proposed amendments would substantially impact the amount of litigation in these areas. For example, with respect to public assistance programs, the wrongful or erroneous denial of benefits has been equated with a violation of federal law -- specifically the Social Security Act -- and consequently, a violation of § 1983. Once such a violation is established, the federal court can order various forms of relief, including restoration of benefits, modification of state policy and procedures, notification to all members of the plaintiff class who were wrongfully denied benefits and the payment of attorneys' fees. The federal court, however, is precluded by the Eleventh Amendment from awarding benefits to plaintiffs on a retroactive basis.

The amendments to § 1983 would affect this scenario in two respects. First, by modifying the "and laws" language contained in § 1983 to read "and by any law providing for equal rights", the Social Security Act could no longer be used as a means of establishing a violation of § 1983 and thus, any injury sustained as a result of violating the Act could be redressed by the federal courts without the requisite finding of a civil rights violation and more importantly, without the necessity of awarding attorneys' fees.

Second, an amendment to § 1983 requiring the aggrieved assistance recipient to exhaust his or her state remedies would have the salutary effect of allowing the state the first opportunity to correct any error which it had made in the administration of the program or the determination of eligibility and at the same time, afford the assistance recipient perhaps the most significant form of relief - the retroactive payment of benefits.

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The Supreme Court has repeatedly invited Congress to address some of the failings of § 1983, and I believe the proposed amendments are responsive to some of those concerns.

I strongly endorse Senate Bill 436 and applaud the efforts of this subcommittee to provide meaningful legislative reform in a very complex and troublesome area of the law.

Senator HATCH. The next two witnesses will be Mr. Roger Cutler and Bryce McEuen. Mr. Cutler is currently the city attorney for Salt Lake City and vice president of the National Institute of Municipal Law Officers. He has testified on this subject in Washington, DC, and is known for his contributions on this topic.

Mr. McEuen recently left his position of city attorney in Orem to establish an organization to deal with the insurance difficulties created by section 1983. His new organization is entitled the Utah Municipal Risk Management Association.

So we are happy to welcome both of you before the subcommittee. We will begin with you, Mr. Cutler.

OPENING STATEMENT OF ROGER CUTLER, CITY ATTORNEY FOR SALT LAKE CITY AND VICE PRESIDENT OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

Mr. CUTLER. Thank you Senator. I am honored to again be asked to address you on this subject. Oliver Wendell Holmes at one time said much of a lawyer's time and effort is spent shoveling smoke. I think that's exactly what is presented by the current status of section 1983 actions. As Mr. Wilkinson has previously testified, I think your statement is extremely cogent and relevant. It eliminates many of the things that I would say, but second what you have already stated.

Section 1983 has become a vehicle, in fact I would say a black hole, under the interpretation of the *Monell, Owens,* and *Maine* cases, whereby almost any State or local action is drawn into a section 1983 suit and jurisdiction because of many factors. I've listed some of those in my prepared statement. However, not only the section 1983 attorney's fee award, made applicable by section 1988, is harmful, but section 1983 is a vehicle whereby a plaintiff can avoid many of the State statutes of limitations. For example, State limitations include caps, under governmental immunity, on liability claims; notice requirements; and the Utah 1-year limitations on actions against the Government are common throughout many of the other areas of the country. These reasonable provisions are not applicable in section 1983 actions.

In section 1983 cases, a plaintiff is able to avoid statute of limitations which allows forum shopping. For example, the *Mismash* case, decided in the tenth circuit, ruled in Utah the applicable statute of limitations is 4 years. In New Mexico, I believe it was 6 years under the *Garcia* decision. So, if you were to take an assault,

battery, or false arrest case in the State of Utah, which has a 1-year statute of limitations under State common law, a plaintiff can avoid the defect of failing to file a notice of claim; also, that plaintiff can avoid a 1-year statute of limitation. Thus, this plaintiff can bring what would be an analagous State common law case in a Federal court—which would be barred in a State forum—merely by wrapping the flag around it and giving it the trappings of the civil rights case. The result is that similarly situated parties will be treated differently.

A plaintiff can also avoid the liability cap in Utah. We have a governmental cap of $500,000 per incident, or I think it's $300,000 per individual. There is no similar cap in Federal court.

In addition, there are already many other advantages for filing in the Federal courts. These include sometimes better staffing and the opportunity to calendar and get your case on at a more expeditious calendering schedule. There are many advantages that come from being able to frame a strike suit. Because of the cost of litigation, cities are sometimes drawn into a position where they have to try and settle cases to avoid—or make compromises in administrative procedure—liability exposure. For these and many other reasons, section 1983 has many engines that drive garden variety common law State cases into a civil rights suit.

To illustrate the resulting explosion of civil rights suits, I've attached an exhibit to my prepared statement, a graph showing the dramatic increase, following the *Monell* decision, of litigation in my small city. I think Salt Lake's experience is a microcausum of what's occurring nationwide.

You'll notice that in 1976 we had about 11 percent of all suits filed as civil rights cases. This is the year that Salt Lake became self-insured and the first year we have statistics. Please note that the year the *Monell* case was decided it jumped to 42 percent. By 1983, civil rights cases represented almost 70 percent of the cases filed against the city. In 1985, that has now dropped down to about 30 percent, largely because we have been successful in our defense; however, we have had claims, from 1980 to 1985, totaling $2.9 billion—almost $3 billion—against Salt Lake.

Senator HATCH. That is billions of dollars?

Mr. CUTLER. Billion dollars. That sum has been reduced to about $1.1 million as of the end of 1985, but it still represents almost a third of the total claims outstanding against the city.

Senator HATCH. Let me get an estimate of cost of defending those cases. How many have you won and how many have you lost?

Mr. CUTLER. We have never lost a civil rights lawsuit, with the exception of two minor cases. The total claims paid, including attorney's fees for plaintiff's lawyers, to date over that entire 1976 to 1985 period, is about $52,000. That sum includes costs of plaintiff's attorney's fees and most of that was in one case involving a pornography issue that was lost, after the Supreme Court—while the case was pending—changed the rules on us.

But the cost of defense in each case generally runs somewhere between $3,000 and $20,000. So, it's small comfort that we have been successful in these cases. The cost of defense and burden of defense is a material aspect and intimidating aspect impacting our city.

Senator HATCH. That is taking into consideration the lesser amount of money that municipal lawyers make compared to say private practice lawyers?

Mr. CUTLER. Oh, yes.

Senator HATCH. They are paying quite a bit more per hour if you had to go out and retain private practice lawyers.

Mr. CUTLER. On occasion we do use outside counsel because of conflicts, and that's another engine for strike suit that I might point out.

Senator HATCH. How many total cases do you have between 1976 and 1986? How many total civil rights section 1983 cases do you have?

Mr. CUTLER. I don't have those statistics with me.

Senator HATCH. Approximately.

Mr. CUTLER. There are approximately 70 cases during that period of time in our small city.

Senator HATCH. The average cost of the defense is somewhere between $3,000 and $20,000 per case?

Mr. CUTLER. Yes, depending on the complexity. One of the vehicles used by a plaintiff's attorney, in an effort to strike a bargain, is to name the offices and the city jointly. Under the governmental immunity statute in Utah, a plaintiff must make an election, except in some limited cases where there is deliberate and willful misconduct on the part of the officer. The plaintiff must elect to sue the employee or the State and the city; he/she can't sue both. That's not true under the Civil Rights Act; thus, a plaintiff will name as many parties as possible, including the city.

Senator HATCH. The State or municipality has to provide a defense for all of those that are named.

Mr. CUTLER. It's not uncommon for them to allege a conflict of interest, because—as I think the Senator is well aware—under the Civil Rights Act you don't have vicarious liability. The city then perhaps is in a position of having to assert that the officer acted in bad faith because we don't have good faith immunity defense to protect ourselves. We are often at odds with our employees and officers by alleging that they must have acted in bad faith.

That is what puts you in a conflict of interest position. The State indemnification statute requires the city to defend; therefore, if the city asserts willful misconduct, that creates a conflict of interest so you have to hire outside counsel. If the city does get a waiver from the employee and does not assert that defense—maybe under a given fact situation you're willing to accept that—then the opposing counsel will try and force you into hiring outside counsel to drive the costs up. Sometimes a government can be forced by conflicts to hire three and four separate outside counsels, paid by the city, driving up the cost and compelling, or being quite an engine to force settlement.

The Civil Rights Act, in my judgment, is seriously abused. The substantive and procedural advantages drive claims that have little or nothing to do with protecting human dignity and civil rights as contemplated by the Klu Klux Klan Act of 1871, into civil rights statutes. It's impossible, I think of a competent lawyer, graduating from law school without being able to draft most any case as one involving a question of "equal protection," "protecting life," "liber-

ty," or some "property interest" and, thereby, bring it within the trappings of a section 1983 action.

The court has created, in my judgment, a morass for itself. Maybe one could compare it with Grisham's Law of Cans: "Once you open up the can of worms, you can't get the worms back into one can." The courts have almost invited Congress to address the problem and give them some relief from the black hole or Frankenstein they have created. Similar to what Attorney General Wilkinson has said, many of the judges I've talked to have indicated they don't feel they have any recourse; they suggest that if you ever want the law changed, please talk to Congress. I'm pleased to do that today.

I think your recommendations are absolutely essential to correct the abusive use of the Civil Rights Act and its negative impact on the governance of local affairs, with the caveat that section 1988 has to be addressed at the same time. This fact is true because that law is the major engine that drives many of these cases to be filed as civil rights actions.

Now, in my prepared report, I have included statements from across the country from city attorneys. I've also attached as an exhibit, a partial study conducted by the 1,800-member NIMLO organization, of which I'm vice president and have been asked to represent at this hearing. May I just refer to a couple of these, Senator? But if I'm taking too much time, would you tell me? May I go on?

Senator HATCH. Go ahead.

Mr. CUTLER. Please refer to page 8. The Park City attorney observed:

> If there is any conceivable way that an attorney can couch a case in a section 1983 case, he does. There is no such thing as a simple assault any more. Every condemnation case and quiet title case is being brought under section 1983. Zoning appeals are not zoning appeals, but all involve equal protection and discrimination claims.

The *Brianhead* case, which you referred to in your opening statement, is an example of that situation. I received a call from the city attorney of that small town—I think there are 70 citizens of that town—which now has a $2.25 million judgment against it under the Civil Rights Act, with attorney's fees yet to be awarded. He indicated to me yesterday that the case grew out of a claim by a developer who asserted that because the city council merely tabled, for further discussion, a plan for development, the suit was brought. He claims that plans were inadequate and did not take into adequate consideration the protection of two streams and some parking drainage problems. Without addressing development problems the developer sued. Successfully arguing that these land-use review processes constituted a "taking" within the meaning of the Civil Rights Act.

The verdict is so outrageous that it awarded $500,000 in punitive damages and a judgment against one of the council members that voted not to table the matter. Indicating how——

Senator HATCH. That sends a message that it just does not pay to serve your community.

Mr. CUTLER. The fear of liability and the personal trauma of being a defendant is driving people out of community service. There are now calls for all these people to resign by the citizens

who are assuming they did something terrible, which I think—if I understand the case correctly—will most likely be reversed on appeal. But the cost and damage to that community—and through the rippling effect of it through the entire State—are absolutely devastating.

I won't read more of these attorney statements, Senator, but may I again support your bill with one caveat and qualification.

First, with regard to changing the law so it reads "equal rights," I think it's absolutely imperative. As you have stated in your opening statement when you introduced this bill, Congress should have the responsibility of deciding whether to provide a private remedy in a Federal statute, rather than leave it to the Federal judiciary with a divining rod. Your amendment would properly restore a section 1983 suit to civil rights cases involving equal protection of citizens and avoiding racial and other similar kinds of abuses.

Your 18-month statute of limitation is an issue which I've litigated on several occasions. I presently have a case pending which it is merely a common law false arrest case in the trappings of a section 1983 action. It was dismissed on all the State claims, because it was not filed within the applicable State 1-year statute of limitation period. Now because of the 4-year limitation ruling for section 1983 actions, under the *Mismash* case, we are back in trial.

I think the 18-month limitations period is more than reasonable; it's longer than the State 1-year statute of limitation which is applicable to most false arrests and assault cases. In my experience, the limitation period is well within a fair and reasonable time for a person to bring a claim. It's also 6 months longer than the notice of claims provisions applicable under most State immunity statutes. Many States say that you have 6 months to 1 year to give notice of a claim against a city before you can file suit. A plaintiff does not have to file such notice under a court decision regarding the Civil Rights Act. Certainly 18 months is not too soon for a local government or State to be aware that a case is pending.

Senator HATCH. That is the same limitation we have in the Federal Torts Claims Act.

Mr. CUTLER. The bill will bring predictability and fairness, and I applaud that uniformity.

The bill's provision granting the good faith immunity defense, I think, is absolutely critical to solve section 1983 intrusive and abusive application against local government. The tenth circuit case of *Bertot* is cited in a footnote in *Owens*. Our own justice, Judge McKay of the tenth circuit, wrote that decision and stated that good faith should not be available to governments because they ought to anticipate constitutional law; he argued that government should err on the side of conservatism of protecting civil rights. However, I think that's a naive and a wrong approach to running government. Certainly, government should err on the side of protecting civil rights, but should the taxpayers foot the bill when courts create new rights and rules which are not foreseeable by reasonable minds? I suggest that it is naive to think government employees, acting in good faith, can or should be expected to do better at predicting the course of constitutional law. It is wrong to deny the government the same good faith defense available to their decisionmakers, personally, and thereby make taxpayers strictly

liable for good faith decisions on existing law which the court—in hind-sight—decides to change or create new law. The case is being abused by——

Senator HATCH. You are not calling one of our circuit courts of appeal judges naive?

Mr. CUTLER. I think he's naive in thinking that——

Senator HATCH. Certainly good faith defense is not an inordinate defense.

Mr. CUTLER. Not only that Senator, I think it's demeaning, to be quite candid. It's demeaning of public officials to assume that they would protect their own, at the expense of making appropriate courageous governmental decisions, unless given a good faith defense, but would not be similarily intimidated if their decisions were going to cause a loss to their community. In my prepared statement, I quote what I think is a representative statement of all city attorneys with whom I'm familiar. This small town of Hutchinson, KS, makes this statement:

> I do not speak to the situation in larger cities, but in Hutchinson, public officials are as concerned about claims against the city as about claims against them as individuals. Thus, the good faith defense presently available is cold comfort to them.

Here this attorney is speaking of the availability to them of a good faith defense, personally, and not to the city.

Senator HATCH. Yes.

Mr. CUTLER. Policymakers and those exercising discretion from a governing body down through the organization spend an inordinate amount of time fretting over decisions because they know good faith is not good to protect the public purse.

We absolutely need the qualified good faith immunity defense. It's amazing that in the nearly 100 years, from 1871 to 1976, local government was not even considered to be a person within the meaning of the act, but within 2 years we are strictly liable. That dramatic shift flies in the face of stare decisis and demands, in my judgment, a legislative correction.

I have one additional concern and one caveat, Senator. I note on page 3, line 7, it says government entity is entitled to a good faith defense, if the court finds that the officials there were acting in good faith. I puzzled over why that language regarding the court finding was inserted. I assume that it is intended to preserve the right for a summary judgment on the issue of objective good faith as discussed in *Harlow* v. *Fitzgerald.*

My concern, however, is that those hostile to this amendment may well read this to mean that the defense is only an issue of law and could not be submitted to the factfinder. We think it ought to be an issue of law, but also one of fact, if a factual dispute exists a judge ought to be able to dismiss it as a matter of law as stated in *Harlow* v. *Fitzgerald;* also, a jury should be able to rule on disputed facts as in the *Tuttle* v. *Oklahoma City* case. There the individual police officer was found to be protected by the qualified immunity of good faith by the jury.

Senator HATCH. We put that language in because of the *Harlow* case. We reversed the *Fitzgerald* case. We wanted to make it consistent. But, your ideas are very good.

Mr. CUTLER. The legislative history ought to reflect that is not meant to be limited and it would still allow a disputed factual issue to go to a jury.

Senator HATCH. Right.

Mr. CUTLER. Alternatively some clarifying language as in your last comment, should be added to the bill.

The exhaustion of State remedies is something I think that also needs to be done. In the *Parrott* v. *Taylor* case, I think the Supreme Court took a swing at trying to restore some federalistic balance by stating that the 14th amendment due process clause could be envoked to prevent abuses of the Civil Rights Act, but that a postdeprivation hearing, available in the State court, would preclude there being a due process violation for a section 1983 property loss case.

My experience in the lower courts, however, is that this case is being given a very narrow reading, and I'm not sure why. I think the Supreme Court hoped that it would reduce their workload, but it has not seemed to be so applied. Thus, I think there is a serious threat to the Federal system, and the healthy balance and respect the State judiciary should enjoy. Requiring that these matters first go through State judicial administrative revenues, will restore that balance. It will also restore some meaning to the question of due process of law provided by the State.

There's an interesting case I've cited which few others finds significant. It's the district case from Michigan. I've cited it in the prepared comments and recommend your reading it. This judge indicates that the civil rights workload on the court is 16½ percent, not the 10 percent that is indicated in your statement. I don't know why those differences are there, but he states that *Parrott* v. *Taylor* ought to be applicable for all cases, except if there is a situation that shocks the conscience. At that point they could file directly in the Federal court.

The solution he suggested, I think, is a good one that I recommend.

I commend you, Senator. All four of the suggestions you made in your bill are critical, as well as amending section 1988. I testified before this subcommittee in May 1981 concerning this same subject. I regret the amendments were not adopted then.

I might briefly address that in a paper and we can then append to this. We applaud you. It needs to be done and we wish you every success.

[The prepared statement of Mr. Cutler follows:]

PREPARED STATEMENT OF ROGER F. CUTLER

I.

INTRODUCTION

On behalf of the Capital City of the State of Utah, and of the more than 1800 local governments comprising the membership of the National Institute of Municipal Law Officers, I thank the subcommittee for the opportunity to appear at these hearings. Salt Lake City and NIMLO would like to go on record in support of efforts to amend 42 U.S.C. §1983, through passage of legislation such as S.436. In that context, we would like to present the subcommittee with some of our reasons for urging passage of remedial legislation.

Since 1981, when I first appeared before this Committee, the City and NIMLO have been active in assessing the damage to local governments caused by the misuse of the Civil Rights Act of 1871. NIMLO has continuously collected data on municipal experiences in defending claims in §1983 actions and has presented this information and statistical data to this subcommittee in the past.[1] Today we are pleased to add to that body of information. Attached to this report are the results of surveys NIMLO conducted during 1985. These surveys polled NIMLO's membership on their experiences with §1983 litigation. Although still not complete, an examination of this data reaffirms the need to amend the Civil Rights Act of 1871 and clarify its original purpose and intent. Failure to do so will insure the continued erosion of the Act into an all encompassing vehicle to usurp and absorb State tort, contract and land-use law. Further, it will also expedite the financial decay facing many local governments, as already strained local budgets strive to meet litigation expenses Congress never intended to be imposed on State and local governments.

Although the Supreme Court has, on occasion, wrestled with the growing problem created in the wake of Monell and Owen by

suggesting some simple negligence cases are not cognizable under §1983[2] and that post deprivation hearings in state proceedings[3] loss cases meet due process standards, these clarifications do not solve the major problems with the Act's application to local government. The negligence issue had earlier been constructed[4] and the Parrott case, in my experience, is a decision that has been so construed by lower courts as almost to be a nullity.[5]

Congressional change is necessary to avoid further damage. In fact, the Supreme Court has stated the judiciary will only change their application of §1983 in response to amendment of the underlying legislation.[6]

Change can be accomplished, without diluting any protection for the legitimate victims of actual civil rights violations; congress intended those victims to be protected by §1983 and we do not desire to change that aspect of the law. However, congress did not intend the law to be used as a catch-all basin for federal jurisdiction and remedies, whenever a party is displeased with a local government or its employees. Unfortunately that is the misuse the Act has been put to in recent years. All evidence indicates that unless something is done, such misuse will increase with the taxpayers of local government, unfairly bearing the burden through needless liability.

II.

NEED FOR AMENDMENTS TO 42 U.S.C. §1983

Before I provide this committee with the highlights of NIMLO's §1983 surveys, I would like to briefly detail why Salt Lake and NIMLO believe legislation such as S.436 is the proper method to alleviate the major problems municipalities are experiencing with the current law.

Throughout this testimony, I will refer directly to some of the comments made by NIMLO members who responded to our surveys and questionnaires. City attorneys are on the front lines in our battle with §1983 abuses and their experiences are not isolated

instances unique to their particular localities, but actual situations, with which local government has had to deal during the last few years.

Congressional action is needed to repair the damage primarily caused by certain Supreme Court decisions interpreting §1983. In Monell v. Department of Social Services,[7] local governments were made subject to liability under §1983. Previously, only individuals acting on behalf of the municipality could be sued. In Owen v. City of Independence, MO,[8] local governments were stripped of the good faith defense available to individuals sued under §1983, and in Maine v. Thiboutot,[9] the third case in this deadly trio, the court expanded §1983 liability to cover violations of all federal statutes.

The explosive impact of these far-reaching Supreme Court constructions of the Civil Rights Act are evident in the statistics. As Senator Hatch noted in his statement introducing the bill, in 1961 the Monroe v. Pape decision which commenced the reinterpretation of 42 U.S.C. §1983, the federal courts reported less than 300 §1983 cases. By 1974, that number had reached approximately 19,300; however, more revealing than sheer numbers is the percentage increase on the court. An interesting analysis made by a federal judge illustrates the impact when he noted that by 1982, the civil rights cases constituted 16.5% of the entire federal case load. The most recent report[10] of the Judicial Conference Report on the Administration of U.S. Courts demonstrates a continuing increase in civil rights filings, and NIMLO would predict that the 1985 report due in six weeks will again show that civil rights filings are increasingly a major portion of the federal case load.[11]

Although Salt Lake City is relatively small in a national context, its experience has paralleled the dramatic burden represented by these alarming federal court statistics. Salt Lake elected to become self-insured for automobile claims in 1976 and for all general liability matters in 1977. As of 1976, only

approximately 11% of all cases filed against the City had Civil Rights prayers. However, by 1978, (the year of Monell), they represented approximately 40% of all suits filed. By 1983, Civil Rights cases totalled almost 70%.[12] In 1984 and 1985, these filings were down, but still represent approximately 30% of all filings. The decrease, we believe, represented a generally downward trend in suits against the City because of lack of litigation success obtained by plaintiffs in the explosive years between 1978 and 1984. This decrease is viewed as temporary and is of small comfort, in light of the defense costs incurred to achieve that result. Further, it does not remove the exposure for an outrageous award, some time in the future, suffered by some of our sister cities.

Salt Lake's exposure also is measured in the amount of damages requested. In the five-year period between 1980 and 1985, suits totalling 2.9 billion dollars in claims have been filed. As of December, 1985, a total of $1.1 million was still outstanding; but this sum represents approximately one-third of all damage claims pending against the City. Of comparative interest is the fact that during this same time period, the City only paid a total of $51,698.90 in damages. In the main, the suits are spurious, without substance, and should never have been filed. With corrective legislation, the City would have minimized its exposure and saved the court and itself substantial costs.

Salt Lake's experience of dramatic shifts and our increases in Civil Rights litigation, together with shifting state tort claims into Civil Rights Actions is mirrored by most other cities across the country. It is not uncommon for a NIMLO member to report a huge increase in the number of §1983 cases filed. For example, in Santa Barbara, California, the number of §1983 cases filed is double of what it was in 1980 and represents 20% of that city's litigation. Norwalk, Connecticut, reports that a quarter of all trial time spent in the corporation counsel's office is on

civil rights cases. According to Norwalk's corporation counsel's office, most of the civil rights cases would never have been brought in the past, and if they had been the subject of a lawsuit, would have been filed in small claims court. Since 1980, Norwalk reports there is at least one lawsuit a year, and more recently, one every two months.

Beaverton, Oregon, reports that in 1980, there were no §1983 cases, yet today more than 50 percent of all tort actions are §1983 claims. In Renton, Washington, the city attorney finds that one in every three suits filed against the city is a §1983 case. Prior to 1980, not one §1983 case had been filed against the city.

The fact that §1983 is being misused is clearly evident from comments made by some of our practitioner members; for example, the following are some comments of city attorneys in response to our 1985 survey:

1. In Deland, Florida, the city attorney has stated that in his ten years as a municipal attorney, he has not seen one §1983 case filed against a municipality which furthers traditional civil rights goals.

2. In Portland, Oregon, the city attorney identified a common experience to many municipal attorneys having to decide whether the city should make a settlement offer, in what it considers to be a non-meritorious plaintiff's case, to avoid the consequences of a court awarding substantial attorney's fees to a minimally successful plaintiff.

3. Park City, Utah and Norwalk, Connecticut, provided examples of cases they found should not have been brought under §1983. In Park City, the city attorney stated:

> "If there is any conceiveable way that an attorney can couch a case as a §1983 case, he does. There is no such thing as a simple assault anymore. Even condemnation cases and quiet title cases are being brought under §1983. Zoning appeals are not just zoning appeals but all involve an equal protection/discrimination claim."

4. The Norwalk corporation counsel's office reports this

particularly questionable civil rights case--a 19 year old youth stabbed his mother in the back on Mother's Day, chopped off a portion of his father's finger, unsuccessfully attempted to murder his younger brother and, after police responded to the scene, charged the police officers with ignoring their orders for him to halt. He was shot once through the stomach and now brings a §1983 action claiming more than two million dollars in damages.

5. Robert W. Ennis, City Attorney, Tuscaloosa, Alabama:

> "We are constantly confronted by lawsuits which are meritless and, under normal circumstances, would never be filed except for the incentive to a lawyer of attorneys' fees despite the amount of award to his client. §1988 encourages litigation which annoys, harrasses, and disrupts governmental operation."

City Attorney Ennis estimates the total amount of attorneys' fees claimed in cases brought against Tuscaloosa is 1.5 million dollars.

6. Carolyn B. Witherspoon, Attorney, Little Rock Wastewater Utility, Arkansas:

> "Why should an attorney try to settle a case and receive little or nothing when he or she can run up a substantial bill and receive huge fees from the court?"

7. Terry Ballard, Asst. City Attorney, North Little Rock, Arkansas: Attorney Ballard states that the availability of attorneys' fees encourages causes of action covered by existing state tort law to be filed in federal court to take advantage of §1988.

8. Don J. Caton, City Attorney, Pensacola, Florida:

> "The availability of fees in low damage or nominal damage suits under §1983 has resulted in a significant shift of claims which have traditionally been filed in local small claims court to federal court, with the attendant delays in the completion of litigation and the added cost of securing outside counsel to handle such claims."

9. Benjamin Brown, City Solicitor, Baltimore, Maryland:

> "The availability of attorneys' fees under §1988 has caused routine negligence cases to be magnified into §1983 claims. If plaintiffs are successful in winning one small portion of their claims, then they are eligible for attorneys' fees for the entire action. This has encouraged baseless and frivolous claims."

10. Frederick Suhler, City Attorney, Rochester, Minnesota:

"In the event such an action would be filed, the amount claimed becomes less of a consideration since the attorneys' fees may represent a more significant element of financial risk than the damages claimed in the main action. This factor also encourages a litigation solution to problems since these costs are readily transferable to the city."

11. Michael R. Vanderburg, City Attorney, Broken Arrow, Oklahoma:

"The fact that prevailing plaintiff can recover attorneys' fees is discussed by plaintiffs' attorneys in virtually every settlement conference involved in a §1983 case. I conclude that this is a significant factor in encouraging the filing of these fees. The fact that the defense virtually never can recover fees even when the defense prevails on all issues, has also been raised at numerous settlement conferences. I conclude that many plaintiffs feel they can bring §1983 litigation with absolute impunity, thus significantly increasing the nuisance value of the law suits, even in non-meritorious cases."

12. Daniel Snyder, Deputy City Attorney, Portland, Oregon:

"Oftentimes this municipality is forced with the choice of making an offer in what it considers to be a non-meritorious plaintiff's case or to avoid the consequences of the court awarding substantial attorneys' fees to a plaintiff that may have been only minimally successful."

13. Scott Bounds, City Attorney, Huntsville, Texas:

"First, the lure of attorneys' fees suck a lawyer into accepting a dog case that should have been screened more carefully prior to filing suit. Accepting his client's versions of the facts, he files a lawsuit he cannot win, and from which he can escape only by trying it, often with a minimal amount of discovery, time and effort. The second scenario is that the attorney gets a legitimate, cannot lose case. The attorney then often seems to take an unreasonable settlement posture and engages in prolonged discovery in order to generate fees and enhance the settlement value of his case." (emphasis added)

14. Clinton Bahmforth, City Attorney, South Salt Lake City, Utah:

"I am convinced that the availability of fees contributes to the filing of 90% of §1983 cases. This city has gone to trial on three cases; settled one and one was dismissed. All five cases were without merit and four of them were frivolous actions."

As illustrated by the foregoing observations of selected

cities from across the country, there are many reasons for plaintiffs bringing an otherwise unmeritorious case as a Civil Rights case or in converting a cause of action from what should be a common-law or State statutory law case, into a Civil Rights Action. In my experience over the last 15 years, these inappropriate shifts of judicial responsibility, mostly to federal courts, and the manufacturing of unmeritorious litigation are a product of judicial construction of the Act, designed to prevent racial abuse following the Civil War. These interpretations on interpretations have become so entwined that, absent legislative correction, they will be uncorrected by the courts.

This pessimistic view is based on the engines that drive inexorably plaintiffs' counsel to the Civil Rights Act and have converted this once concisely appropriate statute into a Frankenstein. These forces include:

1. The shift from absolute immunity to strict liability on the part of deep-pocket municipal defendants, after removal of the good faith immunity defense following Owens v. Independence[13]

2. The fee shifting statute of 42 U.S.C. §1988, which encourages hungry lawyers to file litigation on the hope of obtaining a generous award of attorneys' fees, with little or no risk to a potential client. The result is a consequence of a judicial interpretation creating a dual standard of not awarding local government attorneys' fees when they are a "prevailing party", except in the most extraordinary situation, but awarding generously and without such limitation a prevailing plaintiff.

3. A four-year or longer Statute of Limitation for events which, under State law, would have statute of limitations from six months to two years. For example, in Utah, a one-year Statute of Limitation is applicable for false arrest, false imprisonment and assault.[14] Thus, stale claims will be litigated under the trappings of a civil rights, which could not be maintained under State law.

4. The ability to avoid Governmental Immunity and limits on

awards under State governmental immunity statute; thus, the failure to give timely notice of claim or desire to avoid caps on governmental liability drive the cases to be filed as Civil Rights Actions.

5. The desire to avoid other reasonable State procedural protections, traditionally afforded governmental defendants to protect the public treasury and avoid harrassment of officials. Such restrictions include the requirement to post a cost bonds under State law before filing suits against police officers.[15] Such limitations avoid harrassment suits by criminal defendants who, without a meritorious claim, attempt to intimidate police action by filing suits; these bonding requirements are avoided in filing under the Civil Rights Actions.

6. Advantages of being able to, without expense, be released from prison. Criminal defendants are sometimes motivated to file Civil Rights Actions on the premise that the federal court will order the municipal defendant to pay travel expenses for that defendant to appear and represent himself in the civil rights case; thus, it becomes a pretext to obtain a leave of absence from incarceration at local government expense.[16]

7. The advantage of a "strike suit" is enhanced in a civil rights suit because of the fee shifting statute. This is true because the prospect of an excessive award in federal court and the elimination of State affirmative defenses, such as notice and damage limitation caps, which are not applicable to Civil Rights Actions.

8. Although offset by some disadvantages, the Civil Rights claim serves to get a party into a federal court. This option is often viewed as desirable by some plaintiffs. This is true because generally federal courts have more expeditious calendaring, better staffing, and have many other advantages for a plaintiff. These features may lead to richer settlement negotiations and an enhanced opportunity for a larger verdict.

9. Rapidly envolving concepts of "Due Process", "Equal Protection" and other constitutional federal rights have become a fertile ground to avoid or expand traditional common-law concepts. Novel theories which would be rejected under common-law principles can be draped in the trappings of Equal Protection or Due Process of Law by any competent lawyer; thus, life can be breathed into an otherwise unmeritorious case. This creative tactic can be abused to obtain cash settlements to "buy peace" or intimidate government action to avoid risk in an uncertain area of law.

Thus, the motivations for further expansion of §1983 are pervasive. These, linked with the existing Judicial interpretation and the reluctance of federal trial judges to relinquish cases to State tribunals, compells legislative clarification to restore the Act to its intended and ligitimate purpose.

III

SUPPORT FOR S.436 AND ITS MODEST AND BALANCED CHANGES IN JUDICIAL EXPENSION OF §1983

1. "Laws" means those related to equal rights. Salt Lake City and NIMLO believe that, if §1983 actions were clearly limited to enforce violations of laws providing for equal rights, many abuses such as those above described could be eliminated. The proposed amendment clearly limits §1983 action to those involving Civil Rights violations. This is what congress originally intended when it passed the Civil Rights Act of 1871; it certainly did not intend the situation which currently exists, where local governments can be found solely liable for claims seeking monetary damage based on the administration of grant programs and other programs provided by federal statutes.

For example, a plaintiff might claim that his federal right to cleaner air (grounded in the Clean Air Act) was impaired by a state's or city's failure to enforce pollution restrictions more vigorously, as by inspecting the emission control devices on all automobiles. In a §1983 action, the plaintiff would not be bound

by any doubts the federal EPA might have whether such an enforcement policy was lawful or cost-beneficial. Further, many of the actions of local government officials in federal programs are taken pursuant to federal requirements; yet, the federal officials cannot be sued in §1983 actions. The inequitable result is that local governments are, therefore, absolutely liable, even when the federal officers and agencies issuing the directives (which the local officials merely followed) cannot be joined in the same action and cannot be made to share responsibility.

By limiting §1983 actions to laws providing for equal rights, the true intent of congress in passing the Civil Rights Act is preserved and the misuses of the Act will be diminished.

2. Good faith immunity restored. Salt Lake and NIMLO, also, strongly supportive of the provision in S.436 which reinstates a Good Faith Defense for a municipality. Of all the horrors municipalities face in a §1983 suit, the absence of a good faith defense for the municipality has been identified as the most galling by NIMLO members.

Cities were not even considered "persons" within the Act from 1871 until 1978, after some 100 years of the Act's history and, thus, immune from suit. To go from total immunity to strict liability with the Owen decision is staggering. It is also incomprehensible that a municipality, which can only act through its officials, cannot claim the same good faith defense available to the officials, even after Monell.

The change which S.436 provides would, in effect, overrule the Owen decision. In Owen, the city officials were not liable for backpay to the police chief who was fired, without a hearing, because the Supreme Court decision declaring a right to a hearing was issued weeks after the chief was fired. The City officials could not have predicted the course of constitutional law; they were immunized by their good-faith belief that they had given the chief all the process he was due. The city, however, was found

absolutely liable because it could not take the good-faith immunity of the officers who committed the city to action. This situation results in cities being liable for failing to predict changes in judicial interpretation of federal law.

There are further problems with the Owen decision. The city attorney in Colorado Springs, Colorado, points to a very real potential conflict of interest when both a municipal official and the municipalities are sued and only one has immunity through the good faith defense. This conflict can result in a city being forced to attack its own employee to show they acted in "bad faith" so that the City might be immune as the officer was not effectuating a policy or practice of the City. This conflict in turn forces hiring separate counsel to defend the officer--driving costs out of sight and forcing settlement to avoid personnel and union conflicts, together with minimizing defense costs.

Tuscaloose, Alabama calls the Owen decision a "classic example of the court's lack of understanding for government operations. A government can only act through its officials yet if it is logical and reasonable for the official to obtain immunity, it is just as logical for the government on whose behalf the official acted to have the same defense. Good faith either existed or it didn't."

Rochester, Minnesota echoes this sentiment stating that as a practical matter, it does little good if officials are immune if the government is not. Renton, Washington, finds that without good faith immunity, the city is left in the position of guessing as to the future course of case law or is put in the position of being required to be a seer and correctly divine ambiguous legislation. The city attorney in Renton states that although a city can be completely above-board, and do its best to exercise its discretion, it may still find itself exposed to liability, if it guesses wrong.

The city attorney in Hutchinson, Kansas, summed up the opinion many NIMLO members share:

> "I cannot speak to the situation in larger cities, but in Hutchinson, public officials are as concerned about claims against the city as about claims against them individually. Thus, the good faith defense presently available is cold comfort to them. Policy makers and those exercising discretion from the governing body down, spend an inordinate amount of time fretting over decisions because they know good faith is not going to protect the public purse..."

What the city attorney of Hutchinson has touched upon is a problem NIMLO has seen occurring in many other communities. The officials whose responsibility it is to make decisions, often find they must turn to the city attorney's office out of fear of placing the city in a liability situation. As a result, municipal progress is slowed, or even halted, as routine decisions have to be reviewed to avoid a liability minefield. Thus, the government is not just properly cautious about people's constitutional rights; rather, they are practicing defensive government at its worst: inaction, avoiding decision making and responsibility, and bartering administrative decisions to avoid costly, though unmeritorious litigation.

3. Federal Statute of Limitations. S.436 also makes some jurisdictional changes in the law. It provides for an 18-month statute of limitations. This clarification is necessary to prevent municipalities from having to defend suits stemming from causes of action, often involving officials who have long since left local public service.

It would also minimize the inequity of the same factual circumstance (such as an assault or false arrest) being treated materially different in a State cause of action from one plead as a Civil Rights case. S.436 would treat equals alike, regardless of the forum selected; it would also eliminate one driving force for inappropriately filing an action as a Civil Rights case: the State and federal limitation periods would be more nearly the same for analogous actions. Further, it would introduce certainty regarding the applicable statute of limitations.

4. Exhaustion of State Remedies. S.436 also limits federal court jurisdiction until all other administrative or judicial remedies are exhausted. A trip to federal court to defend a frivolous suit is a costly proposition, particularly for small communities. Unfortunately, many plaintiffs who initiate suits of questionable validity can rely on this fact to gain an advantage in settlement negotiations. Many municipalities find it less expensive to pay a nuisance value settlement or make policy concessions, rather than go through protected litigation in a court, often times, many miles away. The recommended change would force §1983 actions to be brought in forums with a closer tie to the community and a better understanding of the municipality's situation.

In Colorado Springs, the major dilemma with federal court litigation involved the inconvenience and difficulty of litigating outside the local community. Even though all of the witnesses typically reside in Colorado Springs, and sometimes even though the attorneys are located in Colorado Springs, the case must be tried in Denver, approximately 75 miles away.

Similarly, Hutchinson, Kansas recalls a case in which a former city fire inspector sued under §1983 proceeding simultaneously in federal and state courts. After two-and-a-half years, the state court made a final determination which was res judicata of the federal claim. As a result, even though it was successful, the city spent considerable time and money litigating an issue in federal court which could have, and should have, been brought in state court.

Representively, Broken Arrow, Oklahoma, finds that a sizable amount of time, resources and personnel are spent in defense of federal claims, frequently in a manner more expensive and more time consuming than available--state remedies.

Using State administrative and judicial resources will achieve a fair resolution of legitimate claims under the Act and relieve an over-burdened federal judiciary. It will breathe

meaning back into the phrase: "let's not make a federal case out of this" and assist the stated objective of the U.S. Supreme Court not to trivilize constitutional law by permitting state forums to screen unsubstantial or spurious issues.

IV.

NEED FOR CORRESPONDING CHANGES IN 42 U.S.C. §1988

In addition to the changes S.436 makes in 42 U.S.C. §1983, NIMLO believes that Civil Rights Attorney's Fees Awards Act of 1976, codified at 42 U.S.C. §1988, must also be amended to provide local governments with relief in this area.

The purpose of §1988 was to encourage private attorneys general to initiate litigation vindicating §1983 rights and was a direct response to the Supreme Court's ruling in Alyeska Pipeline Service Co. v. Wilderness Society.[17] The increase in litigation under §1983 has been accompanied by increases in both the amount and the litigation over attorneys' fees awarded under §1988.

NIMLO submits that the implementation of the Act has resulted in payment by local governments well beyond that necessary to accomplish the purposes of the Act. It appears that protection of rights under §1983 has become secondary to the collection of attorneys' fees. Actual violations of federally ensured rights are lost in a flurry of frivolous or unnecessary lawsuits that are creatively pleaded under §1983 against local governments and their agents.

Once filed, these suits must either be defended by local governments (usually in Federal court) or settled. If a local government is willing to assume the costs of defending these suits rather than paying a settlement for nuisance value, it must face judicial interpretations of the statute that are quite costly.

Courts have awarded fees where a suit resulted in a consent decree with no admission of fault,[18] in a settlement with no admission of discrimination,[19] and where preliminary or temporary relief of defendant's unilateral or legislative actions moot the

case.[20] Local municipal law officers with whom we have communicated are appalled by cases they have seen where the courts have awarded attorneys' fees which bear no relation to the amount of damages recovered.

This discrepancy between the promise of the Fees Act and its implementation by the courts will remain even if S.436 is passed and §1983 is amended to solve the Owen and Thiboutot problems. This fact is true because even if local governments regain some immunity from damages, fees may still be awarded against governments immune from damages.[21] In Maciejewski, the Court of Appeals reversed denial of an award of attorneys' fees against local officials who were immune from liability because they had acted in good faith. This same result could be reached against local governments even with a good-faith immunity provided by amendments to the Civil Rights Act to solve the Owen problem. To fully protect municipalities, the Civil Rights Act and Fees Act must be amended, in tandem.

V.

SUMMARY

I have quickly reviewed why NIMLO perceives S.436 as necessary legislation. I would now like to bring NIMLO's reasoning closer to home by providing this committee with the information provided by NIMLO members who responded to our surveys. The respondents represent the full range of local governments found across this country, from the large and urbanzied metropolises to the small, rural villages. While the day-to-day concerns of officials of these municipalities may differ, there is an unaniminity of opinion that §1983 must be changed to provide relief to local government.

The NIMLO survey represents responses from 86 municipalities in 36 states. Fifty-eight of these municipalities have reported the total amount of damages claimed against them since 1980 to be an astounding 4.7 billion dollars (actual figure: $4,746,394,509). The total amount of damages actually paid by

the 45 municipalities who had to pay damages was more than 4.2 million dollars (Actual figure: $4,241,582). This taxpayer loss computes to an average of $49,321 paid for each of the 86 municipalities who participated in the 1985 NIMLO surveys.

Should the figure representing the total amount of damages claimed by extrapolated to NIMLO's 1,800 member municipalities, NIMLO's membership would be found to have had more than 39 billion dollars (Actual figure: $39,361,161,200) claimed against them since 1960. If this figure is again extrapolated to the more than 82,000 local government units[22] of this country, we find that four-and-a-half trillion dollars (Actual figure: $4,525,631,988,000) in claims have been brought against local government in the last five years. The NIMLO survey indicates that about nine cents of each dollar claimed in a §1983 action is ultimately paid out by a municipality. We can, thus, estimate that local governments throughout this country have paid a total of nearly two billion dollars (Actual figure: $1,923,514,000) to §1983 plaintiffs.

This huge transfer of resources from local taxpayers to §1983 litigants is not what the Congress of the 1870's intended nor envisioned in passing the Klu Klux Clan Act of 1871.

However, please let me emphasize that neither Salt Lake nor the NIMLO membership oppose protection of constitutional rights of a truly aggrieved plaintiff and an equitable redress for such injury. Nor do we oppose the availability of traditional equitable remedies of injunctive and declaratory judgment to prevent future unconstitutional injury. The abusive use and unjustified expansive reading of that Act, however, must be addressed. The modest changes proposed in S.636 will go a long way to restoring a better balance in remedies, consistency and predictability in this area of the law. It will also enhance the mutual respect and working relationship between the state and the federal judicial systems.

FOOTNOTES

[1]See, Municipal Liability under 42 U.S.C. §1983: Hearings on S.584, S.585 and S.990 Before the Subcommittee on the Constitution of the Senate Comm. on the Judiciary, 97th Cong. 1st Sess. 72-326 (1981).

[2]Daniels v. Williams and Davidson v. Cannon, 54 L.W. 4090, 4095 (decided January 21, 1986).

[3]Parrott v. Taylor, 451 U.S. 527 (1981).

[4]Polk County v. Dodson, 454 U.S. 312 (1981).

[5]See discussion and an attempt to breathe life into the concept of Parrott in Barnier v. Szentmiklosi, 565 F.Supp. 869 (U.S.D.C. Eastern Dist. Mich., S.D. 1983).

[6]Monell v. Dept. of Social Services, 436 U.S. 658, 695 (1978); Maine v. Thiboutot, 448 U.S. 1, 8 (1980).

[7]436 U.S. 658.

[8]445 U.S. 622 (1980).

[9]448 U.S. 1 (1980).

[10]Report of Administrative Service of U.S. Courts "General Civil Rights Cases" at p. 145, table 25.

[11]Barner v. Szentmikloski, 565 F.Supp. 869, 874 (U.S.D.C. Eastern District of [redacted]ia, 1983).

[12]Exhibit "A".

[13]See footnote 8, supra.

[14]Section 78-12-29, Utah Code Ann., 1953; c.f Wilson v. Garcia, 85 L.Ed.2d 254 (1985), 471 U.S. ____, (1985); Mismash v. Murray City, 730 F.2d 1366 (C.A. 10, 1984); and Chavez v. Salt Lake City, U.S. District Case No. C-82-1158J.

[15]Section 78-11-10, Utah Code Ann., 1953.

[16]Penn. Bureau of Corrections v. U.S. Marshalls, 54 L.W. 4001 (Nov. 18, 1985); Carbo v. U.S., 364 U.S. 611 (1961).

[17]421 U.S. 240 (1975).

[18]Massachusetts Fair Share v. O'Keefe, 476 F.Supp. 294 (D. Mass. 1979).

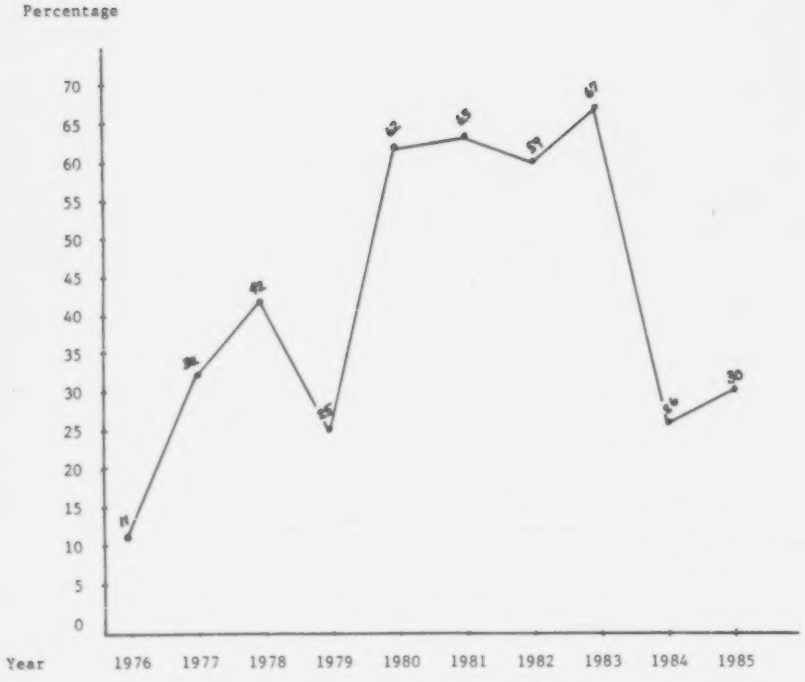
[19]Foster v. Gloucester County Board of Chosen Freeholders, 465 F.Supp. 293 (D.N.J. 1978).

[20]Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980), cert. denied 450 U.S. 1012 (1981).

[21]See Entertainment Concepts v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), cert. den. 450 U.S. 919 (1981).

[22]The International City Management Association reports there are 82,290 local government units in the United States as of 1982. The Municipal Year Book 1985.

EXHIBIT A



Percentage of cases containing civil rights claims

RESULTS OF §1983 SURVEY BY NIMLO

	Number of §1983 cases filed since 1980	Total amount of damages claimed against municipality	Total amount of damages paid by municipality
ALABAMA			
Tuscaloosa	100+	$ 70,000,000	$ 100,000
ARIZONA			
Paradise Valley	1	N/A	$ 15,000
ARKANSAS			
Little Rock Wastewater Utility	2	$ 50,000	$ 0
North Little Rock	10	$ 7,400,000	$ 0
CALIFORNIA			
Escondido	5	N/A	N/A
Huntington Beach	26	$ 17,775,000	$ 52,500
Roseville	6	$ 15,000,000	$ 55,000
Santa Barbara	16	N/A	$ 80,000
South San Francisco	3	$ 1,000,000+	$ 75,000
Torrance	10	N/A	$ 6,500
Watsonville *a	1	$ 1,000,000	$ 0
COLORADO			
Aurora *b	23	$ 31,498,000	$ 17,500
Colorado Springs	N/A	$ 30,950,000	$ 117,500
Greenwood Village	3	$251,311,000	$ 0
CONNECTICUT			
Norwalk	10	$ 8,400,000	$ 24,000
Vernon	1	N/A	$ 0

	Number of §1983 cases filed since 1980	Total amount of damages claimed against municipality	Total amount of damages paid by municipality
MARYLAND			
Baltimore	32	$ 62,932,000	$ 47,000
Cambridge	4	$ 1,000,000	$ 20,000
Easton	3	$ 4,400,000	$ 62,000
MICHIGAN			
Grand Rapids	18	$230,000,000	$ 0
North Muskegon	1	N/A	$ 46,000
MINNESOTA			
Columbia Heights	0	$ 0	$ 0
Rochester	0	$ 0	$ 0
St. Paul	12	$ 50,000+	$ 2,900
MISSOURI			
Liberty	0	$ 0	$ 0
Springfield *d	N/A	$ 15,275,000	$ 37,000
MONTANA			
Bozeman	3	$ 3,000,000	$ 0
NEW JERSEY			
East Rutherford	4	N/A	$ 0
Mantoloking	0	$ 0	$ 0
NEW YORK			
Rye	1	$ 1,000,000	$ 0
NEVADA			
Las Vegas	0	$ 0	$ 0

	Number of §1983 cases filed since 1980	Total amount of damages claimed against municipality	Total amount of damages paid by municipality
FLORIDA			
Daytona Beach *c	13	$ 2,570,000	$ 7,000
Deland *c	3	$ 2,000,000	$ 75,000
Delray Beach	8	$ 750,000	$ 150,000
Fort Lauderdale	17	$ 7,035,000	$ 25,000
Homestead	0	$ 0	$ 0
Pensacola *b	7	$ 4,750,000	$1,500,000
GEORGIA			
Columbia-Muscogee County	N/A	N/A	$ 0
IDAHO			
Moscow	1	$ 300,000	$ 0
ILLINOIS			
Libertyville	2	$100,000,000	$ 0
Springfield	19	N/A	$ 30,354
Urbana	N/A	N/A	N/A
IOWA			
Sioux City	N/A	$ 6,953,500	$ 2,500
KANSAS			
Fort Scott	1	$ 59,500,000	$ 0
Hutchinson	3	$ 1,380,000	$ 0
MAINE			
Bangor	2	$ 0	$ 0
Lewiston	1	$ 3,000,000	$ 0

	Number of §1983 cases filed since 1980	Total amount of damages claimed against municipality	Total amount of damages paid by municipality
NORTH CAROLINA			
Carrboro	0	$ 0	$ 0
Charlotte	41	N/A	N/A
NORTH DAKOTA			
Wahpeton	0	$ 0	$ 0
Williston	1	$ 125,000	$ 8,500
OHIO			
Springfield	4	$ 5,355,523	$ 44,600
Steubenville	6	$ 12,000,000	$ 150,000
OKLAHOMA			
Broken Arrow *e	10	$ 7,158,651	$ 15,000
Midwest City	15	$ 132,880,884	$ 13,000
Oklahoma City	42	$ 125,863,234	$ 273,247
OREGON			
Beaverton	6	$ 500,000	$ 0
Corvallis	14	$ 26,530,000	$ 87,000
Milwaukie	0	$ 0	$ 0
Pendleton	0	$ 0	$ 0
Portland	N/A	$ 69,111,479	$ 795,482
RHODE ISLAND			
Newport	N/A	N/A	N/A
SOUTH CAROLINA			
Columbia	11	$ 11,750,000	$ 1,000
Greenville	10	$ 15,000,000	$ 700
SOUTH DAKOTA			
Pierre	1	$ 20,000	N/A

	Number of §1983 cases filed since 1980	Total amount of damages claimed against municipality	Total amount of damages paid by municipality
TENNESSEE			
Waverly	N/A	$ 3,135,000	$ 37,500
TEXAS			
Abilene	9	$ 9,941,000	$ 125,000
College Station	3	$ 4,979,556	N/A
Fort Worth	39	$ 26,711,434	$ 9,500
Huntsville	5	$ 2,560,000	$ 0
Texarkana	6	$ 67,000,000	$ 0
Tyler	30	$ 35,000,000	$ 0
UTAH			
Murray City	1	$ 10,000	$ 2,000
Park City	3	$ 10,150,000	$ 2,500
Salt Lake City	70	$2,892,343,248	$ 27,799
South Salt Lake City	5	$ 20,000,000	$ 35,000
Springville	2	$ 1,400,000	$ 0
VIRGINIA			
Altavista	0	$ 0	$ 0
Danville	N/A	N/A	N/A
Roanoke *f	9	$ 111,050,000	$ 10,000
WASHINGTON			
Renton	10	$ 22,500,000	$ 27,500
Vancouver	15	N/A	$ 20,000+
WISCONSIN			
Hartland	0	$ 0	$ 0
Sheboygan	10	$ 193,000,000	$ 2,500
West Bend	1	$ 40,000	$ 0
WYOMING			
Evanston	1	N/A	$ 5,000

N/A -- figures unavailable
*a -- 1985 figures only
*b -- figures since 1981
*c -- figures since 1982
*d -- figures since July 1982
*e -- figures since July 1981
*f -- figures since 1984

Senator HATCH. I appreciate your testimony here today. We will now turn to you, Mr. McEuen.

STATEMENT OF BRYCE McEUEN, FORMER CITY ATTORNEY FOR THE CITY OF OREM, PRESENT EXECUTIVE DIRECTOR OF THE UTAH MUNICIPAL RISK MANAGEMENT ASSOCIATION

Mr. MCEUEN. Thank you, Senator. I certainly appreciate the opportunity of being here today and, to avoid redundancy, I'll skip many of the comments I've prepared for you today. I'd like to present a little different perspective and that is the perspective that is now being adopted throughout many States in this country. That perspective is, in the absence of liability insurance, what do you do to protect your city and its local officials from the types of catastrophes that you've mentioned this morning?

I was recently appointed the executive director of the Utah Municipal Risk Management Association, as you mentioned. This association is a cooperative effort among Utah cities to meet the liability insurance crisis which began about 8 months ago on July 1, 1985. At that time, many Utah cities were informed that they had no meaningful liability insurance available to them at any price. We have had to ban together to provide a mutual protection program that protects Utah cities and towns and our current membership contains cities and towns with approximately one-third of the population of Utah.

However, we only offer $1 million worth of coverage. We simply do not have the assets to offer additional coverage beyond that. And for that reason, the *Brian Head* decision that you brought up, as well as the decisions out of other jurisdictions would seriously threaten the fiscal coffers of any of the cities and towns who are members of our association.

We think we are one of the strongest, if not the strongest, liability pool in the State. But we do not have the assets to meet the type of judgments that would be rendered in such a case.

Senator HATCH. One of the problems is that a lot of jurors believe the cities and towns are insured and it really will not cost them or taxpayers anything. In reality it always does.

Mr. MCEUEN. Yes, and as a matter of fact we were told—and I haven't been to London to confirm this, but I assume that it's true—that the reason our insurance was canceled was that London, England, being the source of Lloyds and other reinsurance carriers who primarily cover this coverage, told the people that represented cities and towns in this country that they were sick and tired of the American judicial system and until it was changed, they were going to refuse to come back into the market. If we insisted on playing russian roulette with six bullets in the chamber, they were not going to play that game. And I think that's a good business judgment. I can't fault them for it and I would certainly agree with them.

We join with you and others in strongly endorsing the amendments you propose in S. 436. May I first affirm our strong support for the essential rights and freedoms that are established by our inspired Constitution. As a descendent of those who have been deprived of their constitutional rights, I strongly support the basic

intent of section 1983: To protect and guarantee essential constitutional rights.

I'm very much opposed to what section 1983 has become—a club to be used by every disgruntled applicant or arrestee against local elected officials and peace officers.

Rather than protect our essential freedom it has been used largely to intimidate those who serve the public and has brought disrespect rather than respect to our judicial system. Every domestic fight in which a peace officer is called now, carries the normal threat of physical violence as well as the added threat of extended litigation brought by the drunken ex-husband who refuses to leave the scene, despite repeated requests by the peace officer. Time and money are then expended to defend meritless charges which are eventually dismissed either voluntarily by the plaintiff, or upon a motion for summary judgment by the defendant.

During the 8 years that I have served as the Orem city attorney, we defended approximately, 15 to 26 such civil rights cases. We have never lost one of these cases, but we have been forced to expend $10,000 to $20,000 in time and resources of our own city staff to defend each of these cases before they are dismissed or settled for nuisance value.

I might mention, Senator, that's in addition to the time spent by the counsel hired by the insurance carrier to defend the case. Those costs simply are out of pocket costs.

Senator HATCH. There are attorneys that would cause you to give them the $10,000 or $20,000. And the more you do that the more you incur these kinds of cases.

Mr. MCEUEN. That reminds me of the movie "Jaws," Senator, when they are chumming the water for the sharks, and we decided, as a matter of policy, that we were not going to chum the water. We were going to resist these actions, we are going to defend them and then, in the end, the nusiance value we paid would be such a nominal amount that it would not encourage these types of actions. Unfortunately, or fortunately—I guess—as the case may be, that has not worked and the actions are beginning to multiply.

I was just recounting to Mr. Benson, a recent notice that we received. A prisoner at the Utah County jail, informed us that he would be suing us for a civil rights violation because, as he fled from the scene of a burglary, he jumped on the fence in an attempt to get away from the peace officers. As the peace officers grabbed him to try and apprehend him, he fell off the fence and apparently fell to the ground and hurt himself. He felt that the police officers negligently were trying to apprehend him and therefore he was going to sue them for a Federal civil rights violation. I think that's representative of the type of cases that we are seeing.

Nuisance value, seems to be a term that is particularly applicable to this type of action because, to the very end, we find ourselves paying to avoid the payment of these continued and protracted litigations.

This problem will be further exacerbated by the proposed loss of Federal funds during the next fiscal year. Without general revenue sharing funds and other Federal grants, local officials are faced with the dilemma of raising taxes and/or cutting even more essential services. To defer valuable resources to defend meaningless

1983 lawsuits is particularly galling to local officials in Utah. I commend for your review, a recent article from the National League of Cities newsletter entitled "Essential Services Seen as Next Liability Insurance Cost Casualty," Nations Cities Weekly, February 3, 1986. None of the costs cited above include the costs of maintaining a Federal court system that is increasingly clogged with these lawsuits, which were almost unknown 20 years ago.

May I just insert a personal comment. It's amazing to me that we manage to have such a great and wonderful country, when until a few years ago, no one could sue governmental entities for a civil rights violation. I wonder how all of the rights that we enjoy in this country were developed, if in fact you couldn't sue your local city council for violating your civil rights. It appears to me just from that viewpoint alone that they are a bit unnecessary.

Suffice it to say, that in 8 years, my practice as city attorney shifted from the district courts of Utah to the Federal District Court in Salt Lake City, and as you're familiar with the State of Utah, I'm sure you're aware that this is a serious problem for officials in outlying communities who have to travel great distances.

I would like to address an issue though, that in my opinion, is much more serious than those discussed above. It is possible that the threat of litigation and personal liability will seriously impair the operation and even the existence of local government in our country. You should not underestimate the impact that potential civil rights lawsuits have or will soon have on local elected officials. Mr. Cutler referred to the ripple effect that the *Brian Head* case is going to have in Utah. I have received numerous calls from city council members from small cities asking me what that means to them in their own personal lives, and I've had to tell them that, in fact, above the $1 million limit of coverage which we offer, they would remain personally liable for any judgment rendered against them.

Why should anyone risk his or her family home and assets to serve as a mayor or town councilman for $50 a month? Why would respected citizens want to spend days and days away from their families and jobs to attend depositions, answer burdensome interrogatories and confer with legal counsel in order to defend meritless civil rights claims? Under such circumstances, public service becomes unduly burdensome and will be avoided.

Stories are now beginning to circulate that city councils are going to resign for lack of insurance, towns will disincorporate and cities will face bankruptcy due to liability crises. Of Utah's 226 cities and towns, 202 have populations of less than 10,000 residents, and half have populations of less than 1,000 people. It's not very profitable to serve as an elected official in these small municipalities. If they are paid anything at all, they usually receive a nominal sum of $100 a month or less. These are usually respected citizens that serve at a request of their friends and neighbors. Their efforts improve their communities, resolve local disputes, and promote community spirit.

These thousands of local council members are the backbone of American government and are public servants in the truest sense. The liability crisis has had a very serious impact on local officials. I've had several conversations with mayors and council members

who told me that, unless I could get them liability protection, they were going to resign rather than face what they perceive to be a very capricious legal system.

One mayor I talked to had already resigned once when he found out that they had no insurance but his neighbors convinced him to try again. He and others have a vested interest in your actions, and I'm sure that they join me in encouraging you to act quickly in the passage of S. 436.

I will not speak to the specific amendments, but endorse what my good friend Roger Cutler has said. I defer to his capabilities in that area. I have, quite frankly, as a small city attorney, had to wrestle with other problems. I appreciate his expertise and guidance in that area, and I second everything that he has said, as well as what Attorney General Wilkinson has said.

If I might just make another brief statement, Senator. I would like to be so bold as to propose one other necessary amendment that I think we talked about before, that Mr. Cutler has referred to. Section 1988 is the Attorney's Fees Act, and it states that, "Costs and fees shall be awarded to the prevailing party." I don't know how, but the courts have interpreted this language to mean that attorney's fees should be awarded to the successful plaintiff almost all the time but only rarely to the successful defendant. If I'm the prevailing party, I don't know exactly how they square that, but it's been the ruling across the country and particularly here in Utah, and this ruling is largely responsible for the enormous cost of civil litigation in this area.

If we could get that Civil Rights Attorney's Fees Act amendment to state that in fact it means what it says, and that costs and attorney's fees will be awarded to the prevailing party, I think we can go a long way toward righting this wrong. An old adage states that your right to swing your fist ends at the tip of my nose. In civil rights litigation, it appears that everybody gets a free swing at the nose of a local elected official or employee. This hysteria is very vexing to local officials who must bear the burden and cost of this litigation.

I thank you for the opportunity to talk to you today. I wish you good luck in your attempts to have this amendment adopted and we will give you whatever support we can.

Senator HATCH. With the introduction of S. 436, we would hope to resolve this problem that provides for competent counsel for meritorious suits.

Let me ask one question of both of you. Because of exhaustion of State and administrative remedies for Federal suits under section 1983, individuals and municipalities are not given a chance to resolve the disputes before cases are filed in Federal court.

Now in your opinion, would it be possible to settle a great number of these cases if we—and/or disputes without litigation, if individuals were required to exhaust the administrative remedies before being permitted to bring a Federal district court case suit?

Mr. MCEUEN. Yes, Senator, in my opinion it would. Once again, I concur with what Mr. Cutler said about inferences about the integrity and capability of local officials. Many times it's an oversight or mistake. And as I've said in my written statements, if they can be forced to go to the system and confront those they believe that

have wronged them, and sit down face to face and talk to them in an administrative hearing or otherwise, I think almost all of our local elected officials and employees are good people who do not want to hurt or impair any of their citizens. Given an opportunity, they would welcome the chance to correct what the citizen perceives to be a wrong.

To infer otherwise, is I think, to challenge their integrity and I think that that opportunity should be required and is, in effect, due process of law in a truer sense. I think it makes for a stronger community if, rather than run off to Salt Lake City and file a big civil rights lawsuit and spend thousands of dollars in legal fees, you have to sit down with that local official first and see if you can work out the problem. I think it will be worked out and that would solve about 95 percent of these arguments.

[The prepared statement of Mr. McEuen follows:]

PREPARED STATEMENT OF BRYCE MCEUEN

My name is Bryce McEuen. I am the City Attorney for the City of Orem, Utah. I have served as City Attorney for eight years. I was recently appointed the Executive Director of the Utah Municipal Risk Management Association. This association is a cooperative effort among Utah cities to meet the liability insurance crisis which began about eight months ago. Beginning July 1, 1985, many Utah cities were informed that there was no meaningful liability insurance available at any price. We have had to band together to provide a mutual protection program that protects Utah cities and towns with approximately one-third of the state's population. However, we offer only $1,000,000 of coverage. Our viability and our ability to obtain additional coverage are threatened by the current status of the law interpreting the federal civil rights act, 42 U.S.C. Section 1983. We join with others in strongly endorsing the amendments proposed in S. 436.

May I first affirm our strong support for the essential rights and freedoms established by our inspired Constitution. As a descendant of those who have been deprived of their constitutional rights, I strongly support the basic intent of Section 1983 - to protect and guarantee essential constitutional rights. I am very much opposed to what Section 1983 has become - a club to be used by every disgruntled applicant or arrestee against local elected officials or peace officers. Rather than protect our essential freedoms, it has been used largely to intimidate those who serve the public and has brought disrespect rather than respect to our judicial system. Every domestic fight to which a police officer is called now carries the normal threat of physical violence as well as the added threat of extended litigation brought by the drunken ex-husband who refuses to leave the premises despite repeated requests. Time and money are then expended to defend meritless charges which are eventually dismissed voluntarily or upon a motion for summary judgment. During the eight years I have served as the Orem City Attorney, we have defended approximately fifteen to twenty such "civil rights" actions. We have never lost one of these cases, but we have been forced to expend $10,000 to $20,000 in time and resources to defend each of these cases before they were dismissed or settled for "nuisance value." This term seems particularly applicable to this type of action because, to the very end, we find ourselves paying to avoid the continued expense of protracted litigation.

This problem will be further exacerbated by the proposed loss of federal funds during the next fiscal year. Without general revenue sharing funds and other federal grants, local officials are faced with the dilemma of raising taxes and/or cutting even more essential services. To defer valuable resources to defend meaningless 1983 lawsuits is particularly galling to these local officials. I commend for your review a recent article from the National League of Cities newsletter entitled "Essential Services Seen as Next Liability Insurance Cost Casualty," Nation's Cities Weekly, February 3, 1986. (attached)

None of the costs cited above include the cost of maintaining a federal court system that is increasingly clogged with these lawsuits, which were almost unknown twenty years ago. I presume that you are familiar with the figures showing this dramatic increase and I will not review them. Suffice it to say that, in eight years, my practice as a city attorney has shifted from the district courts of Utah to the federal district court here in Salt Lake City. This is a serious problem for outlying communities.

But I would like to address an issue that is, in my opinion, much more serious than those discussed above. It is possible that the threat of litigation and personal liability will seriously impair the operation and even the existence of local government in our country. You should not underestimate the impact that potential civil rights lawsuits have on will soon have on local elected officials. Why should anyone risk his or her family home and assets to serve as a mayor or town councilman for $50 a month? Why would respected citizens want to spend days and days away from their family and jobs to attend depositions, answer burdensome interrogatories, and confer with legal counsel in order to defend meritless civil rights claims? Under such circumstances, public service becomes unduly burdensome and will be avoided. Stories are now beginning to circulate of city councils who resign for lack of insurance, towns that dis-incorporate and cities which face bankruptcy due to the liability crisis.

Of that's 225 cities and towns, 211 have populations of less than 10,000 residents. Over half have populations of less than 1,000. It is not very profitable to serve as an elected official in these small municipalities. If they are paid anything at all, they usually receive a nominal sum of $100 per month or less. These are usually respected citizens who serve at the request of their friends and neighbors. Their efforts improve their communities, resolve local disputes and preserve community spirit. These thousands of local councilmembers are the backbone of American government and are "public servants" in the truest sense.

The liability crisis has had a very serious impact on local officials. I have had several conversations with mayors and councilmembers who told me that, unless I could help them get liability protection, they were going to resign rather than face what they perceive to be a capricious legal system. One mayor I talked to had already resigned once when he found out they had no insurance but his neighbors had convinced him to try again. He and others have a vested interest in your actions and I'm sure they join me in encouraging you to act quickly on passage of S. 436.

May I speak briefly to each of the proposed amendments.

1. Equal rights. It is essential that the civil rights act not be used as a "catch-all" to seek redress of any alleged grievance. The current system acts as a not-so-subtle affront to the integrity and ability of local government officials.

2. Good faith defense. Since Owen v. City of Independence, we have operated under the draconian situation of requiring taxpayers to pay for the good-faith actions of local officials that are subsequently declared to have violated some right that was unknown at the time of the decision. The logic of this opinion has always escaped me and seems to suggest that the American taxpayer has an endless supply of money with which to redress even the smallest of grievances.

3. Statute of limitations. It is important to note that, effective January 1, 1988, the standard insurance policy has become a "claims-made" rather than an "occurrence" type policy. This means that coverage is provided only for those events which occur and for which a claim is filed during the policy's coverage period. Coverage for extended periods is available only upon payment of additional premiums.

With this change, it is imperative that a much shorter and standard statute of limitations be established. The ruling of Wilson v. Garcia has resulted in an uncertain guessing game of who will wait for three or four years to claim some alleged

violation of his or her rights. These claims are often so old that it is difficult to reconstruct the circumstance of the incident in question. A shorter statute of limitations should also promote prompt remedial action if there is a problem.

4. Exhaustion of Administrative Remedies. We feel that requiring a potential litigant to use available administrative reviews will greatly reduce the federal court workload and will quickly and fairly resolve most disputes. Again, this should help alert local officials if there is a problem. It should also promote resolution before thousands of dollars have been expended in legal fees and positions have become so entrenched that compromise is impossible.

May I also be so bold as to propose one other necessary amendment. As you may be aware, 42 U.S.C. Section 1988 is the civil rights attorney's fee act and helps implement Section 1983. It states that attorneys fees and costs should be awarded to the "prevailing party." However, the courts have interpreted this language to mean that attorney's fees should be awarded to a successful plaintiff but only rarely to a successful defendant. This ruling is largely responsible for the enormous cost of civil rights litigation.

An old adage states the "your right to swing your fist ends at the tip of my nose." In civil rights litigation, it appears that everyone gets a free swing at the nose of local elected officials and employees. This disparity is very vexing to local officials who must bear the burden and cost of this litigation.

I appreciate the opportunity to appear before you this morning. On behalf of the municipal officials and employers of Utah, I encourage you to act quickly in the passage of S. 436.

Thank you.

Essential services seen as next liability insurance cost casualty

"Essential services may well be our next casualty" as cities try to adjust to rising liability insurance costs, the loss of federal funds and state limits on revenue raising, Newton, Mass. Mayor Theodore Mann told those attending a symposium on product and service liability in Washington, D.C. Jan. 29.

Also speaking at the day-long symposium, sponsored by Pennsylvania State University and the National Restaurant Association, was Rep. James Florio (D-N.J.), chairman of the House Subcommittee on Commerce, Transportation and Tourism, one of the congressional committees studying the liability issue and what the federal response should be.

[The subcommittee will hold a day of hearings on liability this Tuesday at which Warwick, R.I. Mayor Francis Flaherty is scheduled to testify on behalf of the National League of Cities.]

Florio said the creation of a federal agency to regulate the insurance industry "is not going to get a very receptive hearing" given the current climate on Capitol Hill. however, "the federal government should not be ruled out as playing at least a facilitating or education role" in helping to solve the liability crisis.

"State governments and the private sector may be able to make at least as significant a contribution to the solution to the liability crisis," Florio said.

The issue is also being studied by a Reagan Administration working group headed by U.S. Assistant Attorney General Richard Willard. The Tort Policy Working Group will make recommendations within the next month to the White House Domestic Policy Council chaired by Attorney General Edwin Meese on what the administration's policy should be. Willard told those attending the conference.

While Willard was not specific on what the group's recommendations would be he said "broad-based reform (of the federal tort system) is the latest solution. It's something that's right to do ... but it will be a long process." He said he hoped one result of the working group would be model legislation for state governments to adopt.

Florio said, while part of the solution may lay with reform of the federal tort system, "the subcommittee has not been supplied with data that proves that the broad scope of the insurance crisis is due to crazy judges and runaway juries.

"We should take a balanced approach that provides improved efficiency, tax treatment for insurance companies and fair payout to victims. There should not be a stampede to cut off recovery for justified claims."

Mayor Mann, who is president of the Massachusetts Municipal Association said tort and civil rights claims totaling more than $20 million have been filed against the city of 84,000, since 1975, however Newton has paid out an average of $40,000 in judgments during the same time period.

Mann said despite "our performance standards and an aggressive legal department, ... the city was compelled to settle more than [illegible] rather than [illegible]

Mayor Theodore Mann, Newton, Mass.

insured for liability insurance coverage ... at twice the rate of the previous year.

"We have been forced to reserve one-half million dollars of the taxpayer's money—more than five times what we are paying in annual premiums—as protection against possible judgments, because the bottom has fallen out of the liability insurance market."

He said a majority of cities surveyed recently by the U.S. Conference of Mayors reported their insurance rates doubled in the last year, for some rates had tripled, and some couldn't get liability coverage at all.

Florio said the increase in the number of lawsuits before the courts and the effect those suits have on some kinds of insurance many be the result of "institutional lapses elsewhere ... The courts are being burdened with problems that have not been adequately addressed elsewhere."

Among those problems, he cited "the collapse of public protection against health and safety," which has contributed to the increase in pollution liability suits, the "crisis in directors and officers liability insurance" which is partly due to "the permissive antitrust environment (which has) encouraged a wave of hostile takeovers, and the "tumultuous" unavail-

Rep. James Florio

ability of child care center insurance, which can be partly attributed to the lack of effective regulations or standardized rules governing child care. The uncertainty in the child care field makes it difficult for insurers to assess the risk or price the product.

National Restaurant Association President Ted Balestreri said the increased activity in the courts "is a brand new problem" that won't be resolved until public attitudes about bringing lawsuits are changed.

"What we are seeing today is widespread abuse of a system designed to curb abuses," Balestreri said. "... When a society begins to mistrust one another it destroys the fabric which made it great."

Mann warned the current situation may also destroy more city programs and services.

"In light of the double squeeze" put on municipal governments by the liability crisis, Gramm-Rudman, and the possible loss of General Revenue Sharing on one hand, and state restrictions on raising revenue on the other, "essential services may be our next casualty," he said.

He recommended cities consider three actions:

§ self-insuring, which Mann called "at best, a transition strategy and a pitiful

Asst. Atty. Gen. Richard W. [illegible]

one at that;"

§ eliminating "our most vulnerable services," which has included cutting back recreation and sports programs in many cities. In Newton that has meant closing some municipal toboggan slides that cities and ice skating areas;

§ "consider enacting waivers of liability from participants in some municipal programs ... especially volunteer programs cities sponsor for senior citizens, children and other groups;"

§ contracting for services in order to place the principal liability burden on the contractor insurers;

§ joining with other governments to form insurance pools;

§ working with state legislatures, the federal government, private organizations and other interested groups to explore universal solutions to the problem.

Besides reviewing tort reform issues, Florio said his subcommittee will study three other areas, how they contributed to the crisis and how they can contribute to the solution: national economic and regulatory policy including high interest rates; state regulation, and practices and problems within the insurance industry. □

Senator HATCH. OK.

Mr. CUTLER. I think that point is illustrated in this *Brian Head* case. The attorney told me yesterday that the hearing was set up by the counsel for these people to come in and address their problems. They in fact did not show up and said well, we are just going to sue you. So sometimes cases are postured just for the purpose of getting into Federal court. And this would avoid that sort of a situation that they would be forced to address the problems, and build a record and to concur with what Bryce has suggested, in most cases those problems would be resolved at the State level.

Senator HATCH. Thank you both. You both have been very helpful to the committee on this issue. It is a tough issue and one that we hope we can resolve.

You have added a lot of dialog, not only today but in the past, and we appreciate the efforts you have put forth.

Our third panel is Robert Madsen, mayor of Ogden, and Bart Barker, Salt Lake County Commissioner. Mayor Madsen.

STATEMENT OF ROBERT MADSEN, MAYOR OF OGDEN, UT

Mr. MADSEN. Thank you, Senator. First of all——

Senator HATCH. Let me interrupt you. I might add the mayor of Brian Head intended to attend this hearing. Is the mayor of Brian Head here? A counsel member is. I would like to give you the opportunity, as soon as we are concluded, to take 2 minutes and tell us about your experience. Would that be all right? We will now turn to Mayor Madsen.

Mr. MADSEN. Thank you. First of all, please accept our appreciation and respect for your willingness to become involved and to lead out. The situation that our cities are in is a time of creating of chaos for many of our time honored institutions. Personally, I have served for the last 14 years on a trustee board of a local hospital, and have walked through the insurance thrashings that have taken place in that industry. I also serve as a director of a bank within the State. I have been walking through the efforts and threats of trying to locate reasonable liability coverage and the concerns of new interpretation under the racketeering clause.

For the past 8 years I've served as a part-time basically lay capacity and a policy setting city council. Around us are hundreds of volunteers who, in good faith, contribute their time to insure better local government. My compatriots are thrilled with the historic interpretation that you are attempting to return in good faith. My plea is to hurry. I do not exaggerate the chilling effect that current interpretation of law—that it will destroy local municipal government. I simply ask, who will be willing to serve as local officials or as volunteers except those that have nothing to lose when the rewards for service are possible disrespect and loss of personal family financial security.

This morning I speak to you of concerns of interpretation of congressional desires, relating to good faith, racketeering, civil rights and the like. I also clearly state that cities seeking to purchase liability insurance today are confronted with many obstacles, exorbitant rates, premium changes, increases to become unaffordable. Another principal not often talked about, but the reduced coverage

even with the increased rates, and the much higher deductibles. There is a shrinking of insurance carriers that are available and to many there are none.

The problems that the cities face follow that full gambit, anywhere from property damage, police, and fire problems, all the way to errors and omissions. The monitary expense is incredible, but it is minor in the sure destruction of capable leadership in the community government. This critical issue is here today. Rising insurance rates, the inability to acquire second level reinsurance, the trends toward enormous judgments against local personnel and government, is destroying individuals and local governments. S. 436 is very important. We rigorously support it.

It appears to bring back reasonableness to Civil Rights and defense of good faith. However, there is also a needed second step relating to the courts. Perhaps some of those causes would be, concerns for economic practices of settling nuisance suits out of court, rather than funding more expensive legal fees, the billing practices of contingency with little responsibility for many attorneys, the huge judgments that can often appear that have little relationship to true justice, and the challenge of joint and several liability, good faith, limitations, immunity, and racketeering.

Throughout the Nation, the attorneys for plaintiffs in effect become the plaintiffs. They have a major financial interest in the case. They are in a no lose situation, because they are seldom responsible for the defense fees. It is becoming—the courts are becoming a vehicle for intimidation and control far beyond justice. Attorneys must have a higher degree of responsibility. This liability storm creates an intolerable situation which invites suits against cities, city officers, volunteers, and elected officials. With the stakes so high in so many cases, a city is practically coerced into settling even though there is no legitimate plan to avoid higher cost of defense, and to avoid even the smallest risk of catastrophic loss.

Horror stories are numerous and easy to recite. Perhaps it could be sufficient to say that the intensity of the current risk is unfair, unreasonable, and destructive to quality government.

Thank you.

[The prepared statement of Mr. Madsen follows:]

PREPARED STATEMENT OF ROBERT A. MADSEN

I appreciate the privilege of speaking to you today. It is not an over statement to say that the current world of "liability" is bringing chaos to many of our time-honored institutions.

Personally, I have served for the past 14 years as a trustee to our 370-bed local, not-for-profit, hospital. Thus, I have been walking through the liability thrashing in that industry.

I also serve as a Board Member of a local bank, which has nearly $3 billion footings. We find this, like many other institutions, is struggling for fairness under the threat of liability and racketeering interpretation.

For the past eight years, I have served in a part-time, lay capacity, on a policy-setting City Council. Around us we add hundreds of volunteers who, in "good faith", contribute their time to insure better local government.

My compatriots are thrilled to see this historic interpretation of "good faith" being encouraged to return to the courts through Senator Hatch's bill. My plea is to hurry. I do not exaggerate that the chilling effect of current interpretation and law will destroy reasonable municipal government. May I ask, who will be willing to serve as elected officials or volunteers, except those who have nothing to lose, when the reward for service is possible loss of respect and loss of personal family financial security.

This morning I speak to you of misinterpretation of congressional desire as to good faith, racketeering, civil rights and the like. I also clearly state that cities seeking to purchase liability insurance today confront major obstacles, such as: exorbitant rates, annual premium increases beyond affordability, together with reduced levels of coverage and higher deductibles. The availability of potential carriers is shrinking for some, and gone for others. These problems cover the full gamut of community insurances from property damage, police and fire, to errors and omissions.

The monetary expense is incredible, but is minor in comparison to the sure destruction of acquiring capable leadership in community governments.

This critical issue is with us <u>today</u>. Rising insurance rates, the inability to acquire the second level, re-insurance and the trends toward enormous judgments against local public personnel and entities is destroying individuals and local governments.

Senate Bill 436 is very important, and we vigorously support it. It appears to put back into effect reasonableness in "civil rights" suits and reactivates the defense of "good faith".

However, there is a needed next step in finding a way to bring reasonableness back into our court system. Some of the causes that I would address are:

a. The apparent overabundance of attorneys.

b. The economic practice of settling nuisance suits out of court, rather than funding more expensive legal fees.

c. The billing practice of "contingence", with little true responsibility for many attorneys.

d. The huge sums that often can appear to have little true relationship to justice.

e. The challenges of Joint and Several Liability, good faith, limitations, immunity and racketeering.

Throughout the nation, attorneys for the plaintiffs, in effect, become plaintiffs. They have a major financial interest in the case. They have a "no lose" situation, because they are not responsible for defense costs and attorneys' fees to defend a client. The courts are becoming a vehicle for intimidation and control, far beyond justice. Attorneys must have a higher degree of accountability.

This is an intolerable situation and is due almost entirely to federal laws and federal interpretation of those laws which invite suits against the city, making the plaintiff's attorneys having direct financial interest in those suits.

It is incredible that the courts would apply the racketeering statute to civil actions when that statute was clearly intended to reach those engaged in concerted criminal conduct.

With the stakes so high, in many cases, a city is practically coerced into settling, even though there is no legitimate claim, to avoid the high costs of defense and even the smallest risk of catastrophic loss.

Horror stories are numerous and easily recited. Perhaps it would be sufficient to say that the intensity of the current risks is unfair, unreasonable and destructive to quality government.

Thank you.

Senator HATCH. Thank you, Mayor. Mr. Commissioner.

STATEMENT OF BART BARKER, SALT LAKE COUNTY COMMISSIONER

Mr. BARKER. Thank you, Senator Hatch, I appreciate a chance to spend a moment addressing the issues you've raised, and I endorse your opening statement as well as the February 7 Congressional Record of your statement to the Senate. I appreciate the chance to deal with the issue that is extremely critical to Salt Lake County and I think all counties and local governments in the State of Utah and throughout the Nation because of the liability and lawsuits under 43 U.S.C. 1983 and the Civil Rights Act of 1871. Lawsuits under this Federal statute against local government entities have increased significantly in recent years and have become, without a doubt, the most significant risk factor facing local governments.

The dramatic increase in the number of section 1983 lawsuits against local governments and the resultant significant costs in defending these actions are attributable to broad interpretations by the U.S. Supreme Court and other Federal courts of the parameters of section 1983 actions and the availability of often huge court-awarded attorney's fees and costs under section 1988 of the act to the prevailing liability of both the governmental entities including Federal, State, and local governments, has changed from a position of immunity or no liability to the current position of almost strict and vicarious liability. Unfortunately, this amenability to lawsuits has encouraged an explosion of litigation without any concrete evidence that individual civil rights were so frequently violated by government that broad application of section 1983 was required. Of course, a significant burden on the courts has resulted.

The costs related to defending these lawsuits, as well as the payment of judgments and attorney government services. Threat of liability has also resulted in significant fear by local units of government to the point of discouraging development of important needed services and service by local government officials.

Several recent cases involving Salt Lake County as a defendant in civil rights lawsuits emphasize the importance of amending section 1983. I would like to give a brief description of Salt Lake County and the cases that specifically speak to this point.

The case of *Deborah Garcia, et al.,* v. *Salt Lake County,* was decided by the 10th Circuit Court of Appeals in July 1985. Salt Lake County appealed from a $150,000 judgment of the U.S. District Court for the District of Utah that it had violated the civil rights of Mr. Garcia by depriving him of his life when he was an inmate in the Salt Lake County jail. Salt Lake County was found to have failed to detect that Mr. Garcia had ingested both drugs and alcohol in what appeared to be an effort at self-destruction or suicide prior to his being placed in the jail and the later failure to send Mr. Garcia to a hospital when he became unconscious.

This is what is most significant. The jury found none of the individual defendants, such as the sheriff, jail officials and the guards, liable or responsible for denial of constitutional rights, but found Salt Lake County as an entity responsible because it allowed in-

toxicated persons to be placed in the jail. This decision is a real anomaly in the law since a government can really only act and perform functions and services through its agents and employees. Perhaps a jury verdict would have been different if Salt Lake County had had the good faith defense, *Owen* v. *City of Independence,* took away from local government entities.

A second case, Salt Lake County is currently actively litigating, as a defendant, is a case in the State district court, that would normally be a simple negligence action involving fire damages to a plaintiffs' building while it was occupied by a division of county government, Salt Lake County Mental Health. Plaintiffs have recently added to their complaint a cause of action for violation of civil rights under section 1983. And this is very interesting. Specifically plaintiffs allege that Salt Lake County acted negligently in causing the fire and their civil rights were violated because the Utah Governmental Immunity Act limits recovery against Salt Lake County to a certain dollar amount and therefore denies them equal protection of the law. This unique liability theory was spawned by the decisions in the Federal court system, and again demonstrates the unusual breadth and intent to which civil rights causes of action impact local governments.

Now a word about costs to Salt Lake County. Increased exposure to local government to section 1983 actions must be considered a significant element and cause of the dramatic increase in the cost of insurance. Salt Lake County has been a self-insured government entity since 1978, but in 1984 we obtained excess liability coverage up to $25 million. The premium was $49,000. In 1985, the quoted rate for only $5 million in coverage was over $185,000, which represented almost a 400-percent increase in the premium with only one-fifth the coverage. To underline the significance of that, in 1984, we were paying less than $2,000 per million dollars of insurance. The proposed rate in 1985 was $37,000 per one million dollars of coverage. That's almost a 2,000-percent increase in costs per dollar of insurance coverage. And of course Salt Lake County chose not to accept this high premium, and is now totally self-insured for all risks and liabilities including the civil rights actions.

The local government services and programs provided by Salt Lake County are particularly high risk programs, viewed in the context of current civil rights litigations. In the year 1985, Salt Lake County paid from its self-insurance fund $442,000 in judgments. Of that amount, approximately $358,000 were paid for civil rights actions. That's 80 percent; 72 percent of the total cost of all of our claims during calendar year 1985 related to the actions brought pursuant to 42 U.S.C. 1983.

Before making comments and observations concerning the proposed amendments to S. 436, I would like to point out that while the increase in the number of civil rights cases under section 1983 may be largely caused by the Supreme Court's decisions in *Maine* and *Owens,* my impression is that that civil rights litigation has increased locally because of a growing awareness of the possibility of recovering large attorney fees under 42 U.S.C. 1988. Unfortunately, this particular proposed legislation does not address this problem specifically.

The first proposed amendment——

Senator HATCH. Let me interrupt you. I have read your proposed amendments. Let me ask some questions. We will put those in the record.

Mr. BARKER. I appreciate that.

[The prepared statement of Mr. Barker follows:]

PREPARED STATEMENT OF BART BARKER

I sincerely appreciate the opportunity to address your Senate Constitution Subcommittee on the very important issue of the risk of lawsuit and liability to local government entities under 42 U.S.C. 1983 and the Civil Rights Act of 1871. Lawsuits under this federal statute against local government entities have increased significantly in recent years and have become, without a doubt, the most significant risk factor facing local governments.

The dramatic increase in the number of section 1983 lawsuits against local governments and the resultant significant costs in defending these actions are attributable to broad interpretations by the United States Supreme Court and other federal courts of the parameters of Section 1983 actions and the availability of often huge court-awarded attorney's fees and costs under Section 1988 of the Act to the prevailing party. Specifically, as a result of court interpretation, the liability of the governmental entities including, federal, state and local governments, has changed from a position of immunity or no liability to the current position of almost strict and vicarious liability. Unfortunately, this amenability to lawsuit has encouraged an explosion of litigation without any concrete evidence that individual civil rights were so frequently violated by government that broad application of Section 1983 was required. Of course, a significant burden on the courts has resulted. The costs related to defending these lawsuits, as well as, the payment of judgments and attorney fees and costs have resulted in a reduction of funds for local government services. Threat of liability also has resulted in significant fear by local units of government to the point of discouraging development of important needed services.

Several recent cases involving Salt Lake County as a defendant in civil rights lawsuits emphasize the importance of amending Section 1983. I would like to briefly describe those cases and their impact on Salt Lake County.

The case of Deborah Garcia, et al., vs. Salt Lake County, was decided by the Tenth Circuit Court of Appeals in July of last year. Salt Lake County appealed from a $150,000 judgment of the United States District Court for the District of Utah that it had violated the civil rights of Mr. Garcia by depriving him of his life when he was an inmate in the Salt Lake County Jail. Salt Lake County was found to have failed to detect that Mr. Garcia had ingested both drugs and alcohol in what appeared to be an effort at self-destruction or suicide prior to his being placed in the jail and the later failure to send Mr. Garcia to a hospital when he became unconscious. The jury found none of the individual defendants (i.e., the Sheriff, jail officials and guards) liable or responsible for denial of Constitutional rights but found Salt Lake County as an entity responsible because it allowed intoxicated persons to be placed in the jail. This decision is a real anomaly in the law since a government can really only act and perform functions and services through agents or employees. Perhaps the jury verdict would have been different if Salt Lake County had had the good faith defense Owen vs. City of Independence, 445 U.S. 622, took away from local government entities.

Salt Lake County is currently actively litigating, as a defendant, a case in the State District court, that would normally be a simple negligence action involving fire damage to a plaintiffs' building while it was occupied by a division of County government, Salt Lake County Mental Health. Plaintiffs

have recently added to their complaint a cause of action for violation of civil rights under Section 1983. Specifically plaintiffs allege that Salt Lake County acted negligently in causing the fire and their civil rights were violated because the Utah Governmental Immunity Act limits recovery against Salt Lake County to a certain dollar amount and therefore denies them equal protection of the law. This unique liability theory was spawned by the decisions in the Federal court system, and again demonstrates the unusual breadth and entent to which civil rights causes of action impact local governments.

Increased exposure to local government to Section 1983 actions must be considered a significant element and cause of the dramatic increase in the cost of insurance. Although Salt Lake County has been a self-insured government entity since 1978, in 1984 we obtained excess liability coverage up to $25,000,000. The premium for that coverage was $49,000. In 1985, the quoted rate for only a $5 million coverage was over $185,000, which represented almost a 400 percent increase in the premium with only one-fifth the coverage. Salt Lake County chose not to accept this high premium demand and is now totally self insured for all risk and liability including civil rights actions.

The local government services and programs provided by Salt Lake County are particularly high risk programs, viewed in the context of current civil rights litigations. In the year 1985, Salt Lake County paid from its self-insurance fund $442,000. Of that amount, approxixmately $358,000 were paid for civil rights actions. Seventy-two percent of the total cost of all of our claims during calendar year 1985 related to actions brought pursuant to 42 U.S.C. 1983.

Before making comments and observations concerning the proposed amendments in Senate Bill 436, I would like to point out that while the increase in the number of civil rights cases under 42 U.S.C. Section 1983 may be largely caused by the Supreme Court's decisions in Maine and Owens, my impression is that that civil rights litigation has increased locally because of a growing awareness of the possibility of recovering large attorney fee awards under 42 U.S.C. 1988. Unfortunately, your proposed legislation does not address this problem.

First Proposed Amendment:

You propose changing "deprivations of rights, privileges, immunity secured by the constitution and laws" to "deprivations of any rights secured by the constitution and by any law providing for equal rights of citizens". My impression is that this proposed language may expand rather than limit the number of potential civil rights lawsuits. Specifically, present case law limits 1983 actions to deprivations of rights, etc., secured by federal laws but it is possible that the courts could interpret "any laws" in the proposed amendment to include state and local laws and thereby subject governmental entities to additional lawsuits predicated upon violations of state statutes and local ordinances. Also, I am unsure what "any law providing for equal rights of citizens" means and this proposed language could cause a flurry of lawsuits seeking judicial interpretation. After discussion with the Civil Division of our County Attorney's Office who litigate most of these cases, it is my recommendation that the amendment should read "by any federal law providing for Constitutional rights".

Second Proposed Amendment

The Owens vs. City of Independence case clearly causes problems for governmental entities by denying them the good faith defense. A related problem is the Supreme Court's rejection of the good faith defense for persons who are sued in their official capacities under Section 1983 in the Brandon vs. Holt, 469 U.S. ___ (1985) decision. Since official capacity lawsuits are in reality lawsuits against governmental entities, the good faith defense should be made available to both political entities and persons who act in their official capacities for political entities.

I would suggest an expansion on your proposed good faith language to provide that political subdivisions and persons who are sued in their official capacities cannot be sued unless the political subdivisions' customs, policies or practices, or the officials' conduct, violated clearly established rights of which a reasonable person would have known. Such language is consistent with the U.S. Supreme Court's good faith test in Harlow vs. Fitzgerald, 457 U.S. 800 (1982), and in Mitchell vs. Forsyth, 472 U.S. ___ (1985).

Third Proposed Amendment

Since Section 1983 has no statute of limitations, prior to April 1985, federal courts had to identify and apply the state statute of limitation most closely analogous to a particular 1983 claim. Because of the difficulty in so doing and the resulting diversity in court decisions, the Supreme Court in Wilson vs. Garcia, in April 1985, decided that all actions under 1983 shall be characterized as personal injury actions and that the courts are to apply the state statute of limitations for personal injury actions. Your proposal to enact a federal statute of limitations of 18 months for Section 1983 actions would be beneficial to government entities. This proposal will provide a common litigation standard for all courts and eighteen months would clearly be a shorter period of time than most current statute of limitations for a personal injury actions.

I strongly support and endorse the proposed legislation in Senate Bill 436 amending section 1983. I believe these amendments strike a balance between providing citizens with reasonable recourse to enforce and protect important Constitutional rights and government entities' interest in being free from unnecessary and costly litigation.

Office of the Salt Lake County Attorney

T.L. "TED" CANNON
County Attorney

MICHAEL N. MARTINEZ
Chief Deputy County Attorney

February 4, 1986

John F. Tanner, Executive Director
Utah Association of Counties
55 South State Street
Suite 300
Salt Lake City, Utah 84111

Dear Jack:

The Board of County Commissioners referred your request of January 28, 1986, on governmental liability to our office for response. I understand Senator Hatch has scheduled a hearing on that date concerning some amendments to 42 U.S.C. 1983. As you well know, the federal statute and cases interpreting that section of the United States Code has significantly increased litigation and risk to local units of government in this country.

In response to your request of January 28th, I had our Salt Lake County Risk Manager prepare the premium history and claim history that you requested. Also included, is a seperate report identifying general liability claims and 42 U.S.C. 1983 claims we have paid during that five-year period. The 1983 related claims dating from 1981 and 1982 which were resolved in 1985 related to federal civil rights causes of action costing approximately $358,000. Approximately $150,000 of that amount involved attorney's fees which are permitted under this federal statute to the prevailing party. I hope this information is helpful. Please advise me of any further details you are aware of concerning this proposed hearing.

Sincerely,

Written by

Chief Deputy County Attorney
Civil Division

Office of the Salt Lake County Attorney

[redacted]

M E M O R A N D U M

TO: [redacted]

FROM: [redacted]

DATE: FEBRUARY 6, 1984

RE: LIABILITY UNDER EMERGENCY ORDINANCE

In 1983-84, Salt Lake County experienced a large increase in "flood" claims. County "Emergency Declaration" and subsequent action by the State Legislature may have protected large sums to the County, although limitations on governmental immunity.

In 1985, a number (four) of tort claimant claims, dating from 1981-1982 were litigated at a cost to Salt Lake County of $250,000.

DAMAGE REPORT TO NIMLO FOR THE
"TORT CRISIS SEMINAR" MARCH 16-18, 1986

FOR THE YEAR:	TOTAL DAMAGE CLAIMS PENDING BASED ON FEDERAL LAW	TOTAL DAMAGE CLAIMS PENDING BASED ON STATE LAW
1980	—	—
1981	—	—
1982	1	6
1983	3	8
1984	5	7
1985	2	41
	11	62

	TOTAL DAMAGE CLAIMS PAID BASED ON FEDERAL LAW	TOTAL DAMAGE CLAIMS PAID BASED ON STATE LAW
1980	$ 28,958	$ 44,812
1981	$ 41,882	$ 87,306
1982	$ 5,500	$ 157,961
1983	$ 124,984	$ 137,126
1984	$ 11,145	184,850
1985	$ 278,606	$ 89,652
	$377,050	$751,707

NAME/TITLE Salt Lake County Attorney's Office

CITY Salt Lake City, Utah

ADDRESS 231 East 400 South

SALT LAKE COUNTY

PREMIUM HISTORY

AUTO AND GENERAL LIABILITY

YEAR	PRIMARY INSURANCE	LIMIT OF LIABILITY EXCESS INSURANCE	PREMIUM EXCESS INSURANCE	CIVIC CENTER INSURANCE	LIMIT OF LIABILITY	ANNUAL PREMIUM
1981	SELF-INSURED	NIL	—	HOME INS.	$ 500,000	$ 20,133
1982	SELF-INSURED	NIL	—	HOME INS.	$ 500,000	$ 19,577
1983	SELF-INSURED	NIL	—	HOME INS.	$ 1,000,000	$ 25,409
1984	SELF-INSURED	$ 25,000,000 4/1/84 – 85	$ 49,126 -	COLONIAL PENN	$ 500,000	$ 25,409
1985	SELF-INSURED	$ 5,000,000 (LIMIT OFFERED)	$ 185,000 - (PREMIUM DEMAND)	COLONIAL PENN	$ 500,000	$ 29,876

NOTE: REDUCED LIMIT OF LIABILITY AT INCREASED PREMIUM ON 4/1/85 (ANNIVERSARY DATE) WAS NOT ACCEPTED BY SALT LAKE COUNTY. NOW TOTALLY SELF-INSURED FOR OTHER THAN CIVIC CENTER.

SALT LAKE COUNTY

CLAIMS HISTORY

YEAR	NO. CLAIMS	COUNTY SELF-INSURANCE CLAIMS COST	NO. CLAIMS	EXCESS INSURANCE CLAIMS COST	NO. CLAIMS	CIVIC CENTER INSURANCE CLAIMS COST
1981	313	$ 129,169 -	-	-	10	$ 1582 -
1982	325	$ 163,461 -	-	-	20	$ 16,247 -
1983	305	$ 262,110 -	-	-	11	$ 19,907 -
1984	461	$ 195,995 -	0	0	8	$ 6,062 -
1985	498	$ 442,009 -	0	0	15	$ 7,575 - (est.)

SALT LAKE COUNTY RISK MANAGEMENT

Senator HATCH. How much has your liability insurance increased?

Mr. BARKER. 2,000 percent increase.

Senator HATCH. I take it from your statement that that case was sustained by the 10th Circuit Court of Appeals.

Mr. BARKER. Yes.

Senator HATCH. Is it being appealed in the Supreme Court?

Mr. BARKER. I'm not aware of the decision at this point of whether we are going to go any further. I think our concern is that the—based on the record the Supreme Court established how it determines these cases, and the fact that the problems we are experiencing, caused by previous decisions on their part, we are not sure we can afford to go any further with the case.

Senator HATCH. Mayor, how has your insurance increased over the last 5 years?

Mr. MADSEN. I think a quick review, the city of Provo a few years ago became self-insured and then lost a $1.2 million lawsuit and quickly went back to the insurance proving the necessity of the insurance. This year our insurance will increase threefold and then if you add to that an increased deductible, it will four times our insurance costs which will cost the city two mills of our tax rate to pay insurance. Our total property tax is 19 mills, that we tax the people, and then add to that that we have no reinsurance.

Senator HATCH. So you are not even sure the insurance company would continue to insure.

Mr. MADSEN. We have actually gone to our State pool that Mr. McEuen has spoken about, and feel reasonably secure during our first few years there.

Senator HATCH. How would your city expect to pay ever increasing liability rates? Would it have to increase mills or what?

Mr. MADSEN. What you do do, is you add——

Senator HATCH. Do you have to forego other programs?

Mr. MADSEN. Yes, you do have to forego other programs. We are so limited as to our tax sources of franchise sales and property, or specific payment for services, that that would—just at that limit so, as you start increasing other costs you start decreasing programs.

Senator HATCH. Either you have to pay exorbitant insurance rates, which may not exist in the future at all because of the influx of these types of cases, or you have to cut back in goods and services. Or you may have to increase taxes. Those are not very good options. I know that your salary in Ogden is very high and probably justifies all this effort you put in to it.

Mr. MADSEN. Up to a year and-a-half ago it was $400 a year now it's $7,600 a year.

Senator HATCH. That is a tremendous growth.

Mr. MADSEN. Percentagewise. It is a difficult problem because the people in the city can only be reasonably taxed and balancing that with services, each year we are lowering services and increasing taxes. This particular one being such a large amount, two mills, is just incredible.

Senator HATCH. I take it every time they increase taxes the people are not very happy.

Mr. MADSEN. Oh, absolutely, nor are we.

Senator HATCH. This problem simply has to be solved and we will do everything we can to do it. Thank you both for your testimony. We appreciate your coming.

Mr. BARKER. Senator, I encourage you to evaluate those amendments that we propose.

Senator HATCH. We will look at them closely.

Let us call the representative from Brian Head. Would you care to tell us your story?

STATEMENT OF H.C. DEUTSCHLANDER, COUNCIL MEMBER, BRIAN HEAD, UT

Mr. DEUTSCHLANDER. Thank you for the opportunity to address you and the other members of this public hearing on municipal liability this morning. I'm appearing here today in the dual capacity. One is a concerned citizen for myself and my fellow council members. And the second, as an elected official in one of the smallest communities in the State of Utah. We are faced with the same problems that the larger communities are, insurability.

One of the values my father taught me, and which I hold dear, was simply if you have a complaint about any system, that I must be prepared to spend both my own time and money in seeking a remedy or solution to the problem. I can not just render the complaint and hope that it will go away and someone else will take care of it. Many of our municipalities are currently operating with no commercial insurance protection whatsoever.

Many communities are operating with reduced insurance protection, and others with questionable protection at astronomical increases in premiums. I firmly believe this situation has caused many qualified, prudent individuals to back away from elected or appointed office because of the possible personal liability they may incur.

Second, municipalities, to make a decision on what gives us the least exposure rather than what is best for our community. A recent court case in which my council, Brian Head, UT, myself, and other elected and appointed officials were involved, is *NWSU Inc.* v. *The Town of Brian Head.* The jury last month found the town of Brian Head, myself, and three other council members, one council woman, and three appointed members of the planning commission, liable for a total of $3.2 million in damages. I wish to point out that the appointed members of the planning commission perform in an advisory function only. And as such, simply recommend approval or disapproval to the town council.

In the *Brian Head* case that has previously been referred to, the proposed condominium project appeared on the town agenda four times in the space of less than 3 months during the fall of 1983. As a result of concerns raised by citizens during the 1983 municipal election, the town council voted to hold a public hearing. The developer stated he would not attend the public hearing and if we did not approve his project he would commence litigation.

A public hearing was held, no action was taken on the project, following his hearing. And on January 14, 1984, the lawsuit was filed naming both the town and individual town council and planning commission members. For 2 years, myself and other elected

and appointed officials, the town of Brian Head, have lived and conducted personal and town business under the threat of this lawsuit.

On January 27 to January 31, 1986, we finally went to trial. And the jury found the town of Brian Head and the various municipal officials liable to a total of $3.2 million in damages. This decision has the potential to bankrupt the town, myself, my fellow council members, and appointed officials, while promoting profit by litigation. Municipalities cannot operate effectively under this type of a threat. I wish to state that neither myself nor my fellow elected officials on the town council ever voted for or against this condo project.

What person in his right mind would want to serve a municipal government when faced with the very real possibility that it does not matter if you vote for, against, or not vote at all on an issue. You, your family, and the municipality may still be liable for money damages, for decisions made as a lay citizen volunteering your time for government service.

Thank you.

Senator HATCH. Thank you, that is quite a story. We will be interested in following what happens in that lawsuit. Who is paying for the defense of you and your fellow council members?

Mr. DEUTSCHLANDER. Right now the town of Brian Head and the insurance company. Several of us have private counsel.

Senator HATCH. Do you have insurance today?

Mr. DEUTSCHLANDER. We have insurance today that will expire at 12 noon on the 1st of March. We will be uninsured after that point. We have not been able to secure—at this point we have not been able to secure any insurance that will carry us on after noon on the 1st of March.

Senator HATCH. Thank you for being willing to share your experience with us today.

Mr. DEUTSCHLANDER. Thank you.

[The prepared statement of Mr. Deutschlander follows:]

Prepared Statement of H.C. Deutschlander

Senator Hatch and distinguished members of the Public hearing on MUNICIPAL LIABILLITY, I am appearing here today in a dual capacity. One as a concerned citizen, for myself and fellow councilmembers, two as an elected official in one of the smallest communities in the State of Utah. One of the values my Father taught me, and which I hold dear was simply, "If you have a complaint about any system be prepared to spend both your time and money in seeking a remedy or solution to the problem. Do not just render the complaint and hope it will go away or someone else will take care of it."

Many of our municipalities are currently operating with no commercial insurance protection whatsoever; many communities are operating with reduced insurance protection; and others with questionable protection and astronomical increase in premiums. I firmly believe this situation has caused:

1. Many qualifed, prudent individuals to back away from elected or appointed office because of the possible personal liability they may incur.

2. Municipalties to make decisions on "What gives us the least exposure", rather than "What is best for our community".

A recent court case, in which my town; Brian Head, Utah, myself; and other elected and appointed officials were involved is N.W.S.U. Inc. vs. Town of Brian Head. The jury found the Town of Brian Head, myself 3 councilmen, 1 councilwomen, and 3 appointed members to the Planning Commission liable for 3.2 million dollars in damages. I wish to point out that the appointed members of the Planning Commission perform an advisory function only and can simply recommend approval/disapproval to the Town Council.

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I wish to state that neither myself nor my fellow elected officials ever officially voted for or against this condominium project.

What person in his right mind would want to serve a municipal government when faced with the very real possibility that it does not matter if you vote for, against, or not vote at all on an issue, you, your family and the municipality may still be liable for money damages for decisions made as a lay citizen volunteering one's time in government service.

Senator HATCH. Our final two witnesses are Mr. John Tanner and Mr. Bill Howell.

John Tanner is executive director of the Utah Association of Counties and Mr. Bill Howell is executive director of the Utah Association of Governments. We will start with Mr. Tanner, and then go to Mr. Howell.

STATEMENT OF JOHN TANNER, EXECUTIVE DIRECTOR, UTAH ASSOCIATION OF COUNTIES

Mr. TANNER. Thank you. I should point out that I represent the Utah Association of Counties. We are an organization of the 29 county governments of the State, and involve 285 elected county officials. And I appreciate the opportunity to speak in their behalf. We have been in contact with them, regarding some of the information that I'll present today. Our counties are faced with an explosion of insurance costs and a growing problem of unavailability of insurance. The following examples will, I hope, illustrate this problem. You've heard of the Salt Lake County situation. Let me review it in a little different perspective. Because its of sufficient size, it has been self-insured for many years, except for excess liability insurance.

Now, however, premiums for the excess coverage have increased and limits of coverage have decreased to the extent of unacceptability. The county is now forced to be totally self-insured at a time when total damage claims for the county based on Federal law have risen from an average for the years 1980 to 1984 of $43,700, from that to $358,606 in 1985. In another large county, Weber County, that is not self-insured, insurance premiums have increased 350 percent in 5 years.

In San Juan County, the southeast corner of the State, the cost of comprehensive general liability insurance rose from 1984 to 1985 by 471 percent. This is at the same time that the county is forced to build a new jail to hopefully avoid further liability. Premiums in Washington County, the southwest corner of the State, have risen 510 percent in 5 years.

In Sanpete County, insurance premiums rose from $10,956 in 1983 to $45,971 for a 3-month period from July to September of 1985. Claims, by comparison, for the 3-year period totaled only $7,145.

Daggett County, the smallest county in the State, with a population of approximately 800, had no claims from 1982 to 1986, yet premiums rose from $4,375 to $11,270. That includes the fact that collision and comprehensive coverage on all vehicles and equipment was dropped from the policy for which the premiums are cited. These examples are not unusual and typify our experience statewide.

The county governments of Utah are guided by responsible individuals who are prudent and conservative with both the responsibilities they carry and the funds entrusted to them to provide services. They exercise their stewardship with integrity and are fair in its exercise. The constitutional rights of individuals are of utmost concern to them, but any protections they have against actions which may be determined to be unconstitutional and in violation of

rights either present or yet to be determined, is rapidly diminishing. There is no protection in the insurance industry for the liability they face at a cost that is affordable.

The examples cited demonstrate that even though, for many counties, claims have not significantly increased, premiums have skyrocketed. Insurance coverage through traditional carriers is no longer affordable and in many cases is unavailable. Many of Utah's counties and cities have had to create pools for self-insurance to provide coverage. This pooled self-insurance has, in the past, been applied only to areas of health and medical coverage. Now, pools established for those programs are forced to expand the scope of coverage to include liability and casualty programs. By doing this, the relative risk of the entire program is increased because of the potential for extraordinary claims that have not been a part of the relatively low risk coverages previously offered. The reinsurance market for liability and casualty insurance is very sparce and selective so the huge settlement potential of civil rights cases is particularly threatening.

From several insurance industry publications, which we reviewed, we read that the U.S. tort system makes casualty business uninsurable because companies have no ability to realistically ascertain just what their losses might be and also that many insurers will no longer provide defense costs as an addition to coverage limits.

The judicial system cannot protect counties from laws and precedent setting decisions which feed the problem. The only solution is in the legislative arena. We are working at the present time with our State legislature to reform the State's liability laws to the extent we can. By far, the issue of most concern at the State level is joint and several liability. Counties and cities are often the deep pocket in which full recovery of awarded damages is sought, even though their actual share of negligence may have been minimal.

The action we are pursuing at the State level, of course, doesn't offer us any protection in Federal courts.

We, therefore, are in full support of the purposes of the bill. We believe that it does not compromise the intent of section 1983. Individuals would continue to have a remedy for violations of equal rights laws and constitutional provisions.

I won't take the time to review all of my prepared statement with regard to suggestions for the amendments that you suggest, I'll just summarize them.

No. 1. The section 1983 claims should be limited to those for which there is no remedy at tort in State law.

No. 2. Plaintiffs should be prohibited from recovering more in attorneys' fees than in damages.

No. 3. A good faith defense to liability should be restored.

No. 4. Maximum award amounts for section 1983 claims should be established similar to those which exist in State law.

Let me just provide one additional item of information, and it relates to a question you asked earlier. I would state that 82 percent of the tax revenue to county governments in this State come from property tax. That's 82 percent of the tax revenues. Twelve counties are currently at their statutory mill levy ceilings. They are taxing property as high as they can tax it according to limitations

of State statutes. Actions which increase costs to county governments can only be covered in one of two ways. Either property taxes have to increase, and at least in 12 counties they can't, or services have to be cut and that's the impact of the kind of actions that your bill addresses.

We applaud and support your efforts in our behalf.

[The prepared statement of Mr. Tanner follows:]

PREPARED STATEMENT OF JOHN F. TANNER

I am John F. Tanner, Executive Director of the Utah Association of Counties. The Utah Association of Counties is an organization of the 29 county governments and involves the 285 elected county officials of the State. I appreciate the opportunity to speak in their behalf.

Counties are faced with an explosion of insurance costs and a growing problem of unavailability of insurance. The following examples illustrate our problem. Salt Lake County, because of its sufficient size, has self-insured for many years, except for excess liability insurance. Now, however, premiums for the excess coverage have increased and limits of coverage have decreased to the extent of unacceptability. The county is now forced to be totally self-insured at a time when total damage claims for the county based on federal law have risen from an average for the years 1980-84 of $43,700 to $358,606 in 1985. In another large county, Weber County, insurance premiums have increased 350% in five years.

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The county governments of Utah are guided by responsible individuals who are prudent and conservative with both the responsibilities they carry and the funds entrusted to them to provide services. They exercise their stewardship with integrity and are fair in its exercise. The constitutional rights of individuals are of utmost concern to them but any protections they have against actions which may be determined to be unconstitutional and in violation of rights either present or yet to be determined is rapidly diminishing. There is no protection in the insurance industry for the liability they face at a cost that is affordable.

The examples cited demonstrate that even though, for many counties, claims have not significantly increased, premiums have skyrocketed. Insurance coverage through traditional carriers is no longer affordable and in many cases is unavailable. Many of Utah's counties and cities have had to create pools for self-insurance to provide coverage. This pooled self-insurance has, in the past, been applied only to areas of health and medical coverage. Now, pools established for those purposes are forced to expand the scope of coverage to include liability and casualty. By doing this, the relative risk of the entire program is increased because of the potential for extraordinary claims that have not been a part of the relatively low risk coverages previously offered. The reinsurance market for liability and casualty insurance is very sparce and selective so the huge settlement potential of civil rights cases is particularly threatening.

From insurance industry publications, we read that the United States tort system makes casualty business uninsurable because companies have no ability to realistically ascertain just what their losses might be and also that many insurers will no longer provide defense costs as an addition to coverage limits.

The judicial system cannot protect counties from laws which feed the problem. The only solution is in the legislative arena. We are working at the present time with our State Legislature to reform the State's liability laws to the extent we can. By far, the issue of most concern at the State level is "joint and several liability." Counties and cities are often the "deep pocket" in which full recovery of awarded damages is sought even though their actual share of negligence may have been minimal.

The action we are pursuing at the State level, of course, offers us no protection against actions brought in Federal courts.

We, therefore, are in full support of the purposes of S436. We believe that it does not compromise the intent of Section 1983. Individuals would continue to have a remedy for violations of equal rights laws and constitutional provisions.

We view the following issues to be essential elements in amending Section 1983 of the Civil Rights Act:

1. Section 1983 claims should be limited to those for which there is no remedy at tort in state law. Currently, a person who could sue in the state court will usually choose not to do so if any claim of a civil rights violation exists since there is no limit to Section 1983 claims and since attorneys' fees may be collected. If plaintiffs were required to use state tort claims in lieu of Section 1983 claims county liability would not only be limited but it would restore Section 1983 to its proper role in the state-federal system. Section 1983 should not be a broad instrument by which the federal courts dictate what traditionally have been state matters.

2. Plaintiffs should be prohibited from recovering more in attorneys' fees than in damages. Currently, the cost of defending a lawsuit may far exceed damages awarded. This adds to county costs and drives insurance rates upward. This limitation on attorneys' fees could encourage settlement of frivolous cases.

3. A "good faith" defense to liability should be restored. Prior to the Owens vs. City of Independence case, public officials were not liable for civil rights violations if they could show that they acted in "good faith" -- that they thought their actions were legal.

4. Maximum award amounts for Section 1983 claims should be established similar to those which exist in state law. Institution of such ceilings on county liability would make insurance more available by increasing the predictability of insurance claims.

We applaud your efforts, Senator Hatch, to correct the problems that we face through S436. We hope these comments are helpful in that regard.

Senator HATCH. Thank you.

STATEMENT OF BILL HOWELL, EXECUTIVE DIRECTOR, UTAH ASSOCIATION OF GOVERNMENTS

Mr. HOWELL. Thank you Senator. When you're at the bottom of the program it's difficult to find something to say that hasn't been covered. I might indicate that Bryce McEuen, with characteristic eloquence, has spoken to some of the things I was going to mention with regard to the effect on small rural governments, so I would defer to his remarks there and also I'd like to mention that Jack Tanner has spoken about the cost increases that I was going to mention. They are in my prepared remarks and you can read what I would say with regard to that in those remarks.

When I got the call from your staff, Randall Rader, last week, I knew very little about this particular problem, it having been one that our association had not involved with. But, having agreed to make this representation on behalf of the communities and counties that I represent, I hastened to hit the road and see what was going on at the grassroots. So, what I have to present to you here is what I was able to gather in a few short days prior to this hearing.

Local officials in rural Utah for the most part, are somewhat unaware of the full extent of liability to which they are exposed, given the full spectrum of applicable Federal laws. They are aware of course, that there is liability and of course they are aware that their rates are spiraling, but they are not aware generally of the full spectrum of laws to which they are exposed.

I might mention my district incompasses southeast Utah, comprised of four counties and 19 municipalities. One town administrator in that district, after having read a copy of the December 7, 1985, Federal Register, or Congressional Record where your comments were enclosed, commented that the effect on people wanting to run for local office and even on those who are in office, would be detrimental, or dampening. He suggested that if they fully understood the extent of liability and exposure, that there would be a decrease in the ferver for running for local office and even some who are in the office as well as employees of municipalities might give second thought to whether they want to stay in that position.

No one to this date, as far as we are aware however, has left office out of fear for section 1983 actions. Local governments experienced a doubling of insurance rates between 1984 and 1985 in our district, to put it simply. In some cases they can't even get insurance, as has already been mentioned. The areas of risk that have been most dramatically affected are errors and omissions, malpractice—malpractice as it pertains to the likes of ambulance and EMT's—police—for such actions as false arrest—and public officials.

As Jack has already indicated, local governments in rural Utah, but probably also in urban Utah, are faced with a rigidly fixed revenue base, if not a declining revenue base through declining Federal and State funds. I might add parenthetically that we support declining Federal funds if that would balance the budget. Also, because of declining tax bases and declining natural resource indus-

tries, they just cannot accommodate the increasing costs that are being heaped upon them.

Section 1983 is clearly problematic to local governments. In addition, section 1988 has also been represented to me by two local attorneys as equally problematic. The problems with section 1988 have been addressed by others here today.

Those two sections have created what appears to be an unprecedented opportunity for litigious individuals and fee hungry attorneys, to go after the public treasuries for the funds they seek. Simple neglect cases, one attorney told me, rapidly become civil rights cases when a municipality is involved.

I might cite one example of that in San Juan County. The Utes and Navajos who live on the reservations in the country are entitled to a property tax exemption on their motor vehicles. For years, however, they haven't been given that tax exemption, or more specifically the exemption was not implemented because of the difficulty in determining which vehicle actually originate on the reservations. There was an administrative remedy available. An appeal to the county would have sufficed.

In any case, the Utes and the Najavos filed suit against San Juan County for redress, and return of prior taxes paid. This, as I indicated, could have been solved administratively but of course it was filed as a section 1983 case. The intent, as I've been told, was merely to make sure that the legal fees did not fall upon the plaintiffs.

To conclude, I would say local municipalities have sustained the first waive of impact from section 1983, simply by digging deeper into their public treasuries for legal fees and insurance premiums. In the not too distant future if things remain as they are today, it would be reasonable to expect that the fabric of quality local municipal government will unravel as treasuries are bankrupted and as qualified individuals leave public service, or don't apply or run in the first place.

Passage of S. 436 is imperative to correct what we believe is a glaring statutory oversight. Attention should also be given to section 1988 which appears to disproportionately place the onus for legal fees upon local municipalities.

Thank you, Senator, for this opportunity.

[The prepared statement of Mr. Howell follows:]

Prepared Statement of [illegible]

Senator, members of the Committee. I have been asked to offer an anecdotal perspective to the effect of AB 283 1983 on small rural municipal jurisdictions. Particularly, I was asked to speak to the effect of this statute on local officials personally as well as the effect on local budgets.

It is generally safe to say that while local municipal officers are aware of the relatively recent increased costs of insurance, most rural local officials and officers are not aware of the degree to which they are individually liable for damages under the vast array of federal statutes by virtue of section 1983. In some instances, officials are not completely knowledgeable as to the extent of their exposure and still willing to serve, feeling that they can be sufficiently fair and just to avoid such action. However, one local city manager, after having read your discussion in the December 7, 1987 federal register, commented that if the potential for personal actions were generally known, the ambivalence for running for public office would be severely dampened and some current office holders and staff might even resign. To our knowledge no one in San Francisco has left office, as yet, as a result of section 1983.

Rural that is experiencing an increasing number of section 1983 cases however. Without relief it will be only a matter of time before the ability of local government suffers from the lack of qualified persons available and willing to hold elected positions.

Consider the following as a case in point. A detainee in the San Juan County jail committed suicide by hanging. A section 1983 suit has been filed naming San Juan County, members of the County Commission, the County Sheriff, and the jailer as defendants. Total damages of 1 million are being sought.

By now the Committee is probably aware of the recent case involving Grimshaw Gas where the municipality was found liable for speculative profits of 3,000,000 plus compensatory damages of 300,000. The Exxon Valdez, the city council and three members of the Planning and Zoning Commission were assessed a total of 500,000 in punitive damages. This was also a section 1983 case.

Local officials in rural Utah receive varying amounts of financial remuneration for their efforts. Municipal officials usually receive $5-10

dollars per month. County Commissioners generally receive in the neighborhood of $5,000 annually. Certainly, their meager compensation does not compensate them for their liability exposure.

Between 1984 and 1985 each county and municipality with whom I checked, experienced a doubling of insurance premiums. For example, Grand County's insurance premium went from 35 thousand annually to 70 thousand. Carbon County spent $8,000 for $ million in liability coverage in 1984 and $8,500 for $00,000 in liability coverage in 1985. Carbon County's total premium in 1985 was $5,000 which was $4,000 over budget. Moab City was paying $,000 for $ million in liability coverage in 1984 while in 1985 they paid $,000 for 1 million in liability coverage. Monticello City's insurance premium went from 9 thousand annually in 1984 to nearly 20 thousand annually in 1985. The greatest cost increases have been in the areas of Errors and Ommissions, Malpractice (for such as ambulance drivers and EMT's), Police (for such as false arrest) and Public Officials. Faced as they are with decreasing revenues from federal and state budget reductions as well as from declining tax bases due to the decline of local industries, small local jurisdictions are at their capacity to accomodate such dramatic cost increases. Municipal governments are rapidly being driven out of the commercial insurance markets.

It has become obvious to us that section 1983 has created an unprecedented opportunity for litigious individuals and fee hungry attorneys. The limited public treasuries of local governments and municipal officials is the clear target.

In San Juan County the Utes and Navajos who own motor vehicles on the reservation are eligible for a property tax exemption. For many years, the exemption has been overlooked since there was no expeditious way to identify those vehicles originating on the reservation. While the Utes and Navajos had recourse to administrative remediation, they chose to file a section 1983 case. As a section 1983 case, the plaintiffs were not liable for their court costs. It was the "deep pockets" of the county that were tapped for attorney's fees.

With a reduced probability that he will be responsible for court costs, an individual has an incentive to file a section 1983 case. With the prospect of

dipping for fees into the municipal treasury, an attorney has an incentive to take on the case and to prosecute the case in such a manner as to enhance fees.

Clearly, local municipalities are ripe targets for a double barreled attack of unlimited actions under section 1983. Cases that would be under other circumstances, simple negligence quickly become equal rights cases and for purely monetary reasons. Parenthetically, I might add that an insurance agent for Grand County has indicated that his firm pays out 4 dollars in legal fees for every 1 dollar in claims largely as a result of section 1983.

I would offer the following remarks in conclusion. Local municipalities have sustained the first wave of impact from section 1983 by digging deeper into their public treasuries for legal fees and insurance premiums. In the not-too-distant future, if things remain as they are today, it would be reasonable to expect that the fabric of quality local municipal government will unravel as treasuries are bankrupted and as qualified individuals leave public service. Passage of S. 436 is imperative to correct what we believe is a glaring statutory oversite. Attention should also be given to section 1988 which appears to disproportionately place the onus for legal fees upon the local municipality.

I would like to thank you, Senator Hatch, for the opportunity to share these remarks with you and members of your committee.

Senator HATCH. Thank you. We have discussed many problems today. Are these just isolated problems or are you finding that nearly every community is facing them to a more or less degree?

Mr. TANNER. Well, the problem that the counties for the most part are expressing at the present time is concern over the availability of protection. That's their primary concern. Most of the counties in the state have not been faced with significant civil rights violation cases. The large counties have, most of the smaller ones haven't. So their concern right now is just over the availability of protection against the eventuality of those things occurring.

I would say that if they understood fully the liability that they face under the potential for action they would be much more concerned, and they are indeed becoming more concerned.

Senator HATCH. I am aware of one small town that learned that its insurance premiums would exceed the town's entire budget. Accordingly the city officers elected to disband the town. What options does a small town or a community have when insurance rates begin to out strip their individual resources?

Mr. HOWELL. Sounds to me like that community came up with the only option it had at its disposal.

Senator HATCH. That still does not protect them.

Mr. HOWELL. That's true, it doesn't, but if they don't have the money to run the city, then they effectively don't have a city.

Senator HATCH. City and town officials who often serve for little if any pay, are still at risk if they could be sued under section 1983. Has this discouraged good leadership serving in these smaller communities or even big communities?

Mr. HOWELL. Thus far, I haven't found one individual who has not run as a result of this because this is a relatively new advent—at least in our area it is. The impact of section 1983 is not fully appreciated, as I indicated initially. They are not aware that they are susceptible to the full spectrum of Federal laws. I suspect that without being remediated or without having the statutes changed, the reality of their liability will soak in, particularly in view of the *Brian Head* case and others that no doubt are pending.

So, I expect definitely, that it will have a dampening effect on people wanting to run. It will probably result in certain people chosing to leave office. However as of this date, I have not been able to find one elected official who plans on resigning office as a result of section 1983.

Senator HATCH. I imagine if they knew about this law and what happened in Brian Head, you would find a lot more of them that would say: "This isn't worth it."

Mr. TANNER. I'd suggest, Senator, that most all county officials were elected for terms they are previously serving just as this problem began to develop, 2 years ago. They will all be up for reelection this fall, and we'll be interested to see what kind of an impact that has on the number of people who choose not to run.

Senator HATCH. This has been a very important hearing.

I want to thank the mayor of this town and other effected officials who have made this facility available to us. And I would like to thank all the witnesses that have taken time to appear before us.

We will recess until further notice.

[Whereupon the meeting was recessed.]

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